EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2019/61

EDWIN L O'NEAL	**FIRST CLAIMANT**
WINSTON BAILEY	**SECOND CLAIMANT**
CORAL BRAMBLE	**THIRD CLAIMANT**
PHILMORE GILKES	**FOURTH CLAIMANT**

AND

BARBADOS AGRICULTURAL MANAGEMENT COMPANY LIMITED	**RESPONDENT**

DATE: August 19, 2021

BEFORE:	Before The Hon. Mr. Justice (ret'd) Christopher Blackman GCM; Q.C	Chairman
	Edward Bushell, Esq.	Member
	Frederick Forde, Esq, GCM	Member

APPEARANCES: Mr. Sean Lewis and Miss Dawn Agard, Attorneys-at-law for the Claimants.

Mr. Deighton Marshall, Industrial Relations Consultant for the Respondent.

DECISION

1. The issue for determination in this matter is whether there was compliance by the Respondent with the provisions of Section 31 of the **Employment Rights Act (the Act)** when the Claimants were made redundant in December 2018.

BACKGROUND

2. The First Claimant was employed by the Respondent as a Farm Supervisor on May 5, 2009 and in January 2016 he became a Non Sugar Crops Unit Manager. In his own right, the First Claimant was active in the Sugar Industries Staff Association **(SISA)** and on January 29, 2016 he was elected President of **SISA.**
3. The Second Claimant was employed by the Respondent as a Farm Supervisor on March 1, 2000 and in August 2016 he was appointed a Farm Manager. During the period of his employment, he was a member of **SISA.**
4. The Third Claimant was employed by the Respondent as a Factory Process Supervisor on July 1, 1993 and on April 1, 2014 he was appointed Mechanical Workshop Supervisor. He was active in **SISA,** serving on the Association's Council during the period 2008-2016 as a floor member.
5. The Fourth Claimant was employed by the Respondent as a Farm Supervisor on March 2, 2009 and on August 1, 2016 he was appointed a Farm Manager. Like the Third Claimant, he also served on the Association's Council during the period 2016-2018 as a floor member.
6. The Respondent Company is wholly owned by the Government of Barbados and incorporated under the Companies Act, Cap 308 of the Laws of Barbados. It manages a number of sugar estates and other non-sugar farms and entities.

Chronology of events, October 26, 2018 to December 31, 2018

7. On **October 26, 2018,** Mr. Leslie Parris General Manager of the Respondent wrote the President of **SISA** as follows:

"Re: Consultation with the union

Following discussions and negotiations within the Social Partnership, The International Monetary Fund (IMF) and the other international financial institutions, the Government of

Barbados, under the Barbados Economic Recovery and Transformation Programme (BERT) has taken the decision, as part of the rationalization and restructuring of the Barbados Agricultural Management Co. Ltd, to reduce its financial subvention/support to the Company by $10.0M - $12.0M in 2018.

This decision, you will no doubt appreciate, will impact on the Company's overall operations in 2018/2019 as well as its ability to maintain current levels of staffing in both the Company's Agricultural and Factory operations.

In this regard and in accordance with collective bargaining protocols, the Company is notifying the Union of its intention to commence the consultation process with the Union as is required under the Social Partnership Protocols and under the provision of the ERA at the earliest opportunity."

8. On **October 30, 2018** Mr. Parris in a letter addressed to all **BAMC Employees** sought to determine how many employees would be interested in a voluntary separation package, on terms detailed in the said letter.
9. The Claimants, in their Written Submissions stated that by letter dated **November 8, 2018** by **SISA** to the Respondent, **SISA** condemned the manner in which the Respondent handled the matter and sought a meeting with the Respondent for **'meaningful dialogue.'**
10. However, on **November 15, 2018** Mr. Parris in a letter addressed to all **BAMC Employees,** withdrew the offer made by the letter of October 30, 2018, due to "severe financial constraints". There was however a revised proposal for those employees who may have been interested in a voluntary separation package.
11. **SISA** by letter dated **November 19, 2018** to the Respondent noted that up to that time, the Respondent had failed to consult with SISA with respect to the voluntary separation package offered to the employees.
12. On **November 23, 2018** Mr. Parris wrote the Chief Labour Office as follows:

"Re: Redundancies"

Following discussions and negotiations within the Social Partnership, The International Monetary Fund (IMF) and the other international financial institutions, the Government of Barbados, under the Barbados Economic Recovery and Transformation Programme (BERT) has taken the decision, as part of the rationalization and restructuring of the Barbados

Agricultural Management Co. Ltd, to reduce its financial subvention/support to the Company by $10.0M - $12.0M in 2018.

This decision, you will no doubt appreciate, will impact on the Company's overall operations in 2018/2019 as well as its ability to maintain current levels of staffing in both the Company's Agricultural and Factory operations.

The proposed method of selecting these employees for redundancy will be based on Last in, First out, (LIFO) where possible. The company has offered voluntary separation to employees as well.

The Company wants to complete this process by 30 November 2018 and will begin the consultation process with the Unions (who have been informed by letter of 26 October 2018 of the restructuring process at the BAMC) and thereafter these details will be confirmed in writing to the affected employees.

Enclosed are details of numbers of the affected employees."

13. The Respondent met with representatives of **SISA** for the first time on **December 5, 2018** at which time a list of the employees, members of SISA, who were to be severed was presented for review and discussion.
14. On **December 11, 2018** the Chief Labour Office acknowledged the Respondent's letter of November 23, 2018.
15. The Respondent's second meeting with **SISA** was held on **December 12, 2018** at which a number of questions were posed. Those questions were answered by the Respondent in a letter dated December 14, 2018. On the issue of the list of employees to be retrenched, the First Claimant asserted for the record that:

    "We will not be responding to any list until SISA is able to drill down in the Company."
16. The Respondent's letter of **December 14, 2018** to **SISA** essentially reiterated what had earlier been stated in the letter of October 26, 2018 to **SISA.** Some new information was provided to the effect that ***"The proposed method of selecting these employees scheduled for redundancy is based on the Last in, First out, (LIFO) wherever possible. In addition, employees have been given an option of voluntary separation and a total of sixty-two (62)***

persons which included seven (7) persons from SISA's membership have accepted this facility." With respect to the request that the list of persons to be retrenched be reviewed, the Respondent advised that ***"The company stands ready to hear any written submissions in the first instance or otherwise that you may have regarding the list/schedule which was provided to the Association on Wednesday 5th December 2018.***

The company is therefore suggesting that a meeting be held on Wednesday 19th December 2018 at 2:00 pm at our offices with a view of concluding this matter."

17. The Respondent's third meeting with **SISA** was held on **December 19, 2018.** Mr. Parris in his Witness Statement noted that the chairman of the meeting referred to the letter of **December 14, 2018** noted above, and asked for a response, but none was forthcoming. As a result, the Respondent came to the conclusion that the consultation process had come to an end.

18. On **December 27, 2018** the Respondent wrote to the President of **SISA.** In that letter the Respondent referred to the three consultation meetings held on December 5, 12 and 19, and concluded the letter by stating: ***"The company wants to state that given its severe financial and time constraints, it has acted reasonably and practically in the consultation process and has satisfied all legal requirements in this process.***

Accordingly, eleven (11) of the fourteen (14) persons selected for redundancy will be given their letters today, 27th December, 2018 detailing their entitlements which will include Holiday Pay due, Notice Pay and Severance Pay. The remaining three persons will be issued with the same on their return to work."

19. The Respondent by letter dated **December 27, 2018** and headed **Notification of Redundancy** advised the four (4) Claimants that the date of termination of their employment would be **December 31, 2018.** The letter also gave details of payment in lieu of notice, outstanding vacation pay and the like.

20. By letter dated **January 15, 2019** to the Chief Labour Officer, **SISA** in conformity with section 42 (2) of the Act, gave notice of the dispute with the Respondent and the termination of the employment of the four Claimants.

21. The Chief Labour Officer having been unable to resolve the complaints through conciliation, on **December 11, 2019**, in accordance with section 44 (1) of the Act, referred the several complaints to the Tribunal for determination and settlement.

22. The issue therefore for determination by the Tribunal is:

(a) Whether the Respondent carried out consultations in accordance with section 31 (6) (a) of the **Act** or (b) whether there were special circumstances as per section 31 (6) (c) which rendered it not reasonably practicable to comply with the requirements of section 31 (6) (a) of the **Act.**

THE LAW

23. Section 31(1) (a) of the Act provides that the dismissal of an employee does not contravene the right conferred by section 27 not to be unfairly dismissed, if the reason for dismissal is that of redundancy. Section 29 (1) moreover provides that it is for the employer to show that dismissal by reason of redundancy is fair. Section 31(4) (5) and (6) of the Act details the steps employers must take to meet the criteria for the dismissal to be fair.

24. The provisions of Section 31(4) (5) and (6) are:

"(4) Where it is contemplated that the workforce of the business of an employer will be reduced by 10 per cent or any other significant number, before the dismissing an employee, the employer shall

(a) carry out the consultations required by subsection (6) (b); and

(b) supply the employee or the trade union recognized for the purpose of bargaining on behalf of the employee (if there is one) and the Chief Labour Officer with a written statement of the reasons for and other particulars of, the dismissal.

(5) The statement referred to in subsection (4) (b) shall contain particulars of

(a) the facts referred to in subsection (2) relevant to the dismissal;

and

(b) the number and categories of affected employees and the period during which their dismissals are likely to be carried out, where any employee, in addition to the employee in question, are affected by those facts.

(6) The consultation referred to in subsection (4) (a) are consultations with the affected employees or their representative, being consultation conducted in accordance with the following requirements:

(a) The consultation shall commence not later than 6 weeks before any of the affected employees are dismissed and shall be completed within a reasonable time;

(b) The consultation shall be in respect of

(i) the proposed method of selecting the employees who are to be dismissed;

(ii) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take place; and

(iii) any measures that the employer might be able to take to find alternative employment for those to be dismissed and to mitigate for them the adverse effects of the dismissals; and

(c) where, in any case, there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements of paragraphs (a) and (b), the employer shall immediately consult with the Chief Labour Officer and take all such steps towards compliance with the requirement as are reasonably practicable in all the circumstances."

THE COUNTER-CLAIMS

25. The Claimants in their Written Submissions submitted that the letter of October 26, 2018 from the Respondent to **SISA** by which the Respondent gave notice of its intention to commence the consultation process as stipulated by the Act, **was not** a consultation within the provisions of the Act. The Claimants stated that there were no meetings between October 26, 2018 and December 5, 2018 despite **SISA**'s request for a meeting. The first meeting was held on December 5, 2018 with subsequent meetings on December 12 and 19, 2018 with dismissal of the Claimants occurring on December 31, 2018 a mere 27 days after the first consultation.

26. The Respondent on the other hand in its Written Submissions has contended that the letter of October 26, 2018 from the Respondent to **SISA** was sufficient to commence the consultation process and that consequently the statutory duty to carry out consultations

with all affected employees no later than 6 weeks before dismissal as specified in the Act, was adhered to by the Respondent. The Respondent further submitted that it consulted with the Claimants 'in good time' and relies on two authorities, ***Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computer Oy*** **Case C-44/08** dated 22 April 2008 which was concerned with an interpretation of an European Council directive 98/59 EC, and ***Amicus v Nissan Motor Manufacturing (UK) Limited*** UKEAT/0184/05 dated July 26, 2005 relating to consultation 'in good time' as provided for in Section 188 (1A) of the Trade Union and Labour Relations (Consolidation) Act 1992.

DISCUSSION

27. Consultation in the context of industrial relations matters, must be meaningful, not a pro forma exercise. The word **'consultation'** is defined in the **9th Edition** of **Black's Law Dictionary** as ***'a meeting in which parties consult or confer.'*** Moreover, as Judge Levy Q.C sitting as an Appeal Tribunal Chairman in ***Rowell v. Hubbard Group Services Ltd. [1995] IRLR 195*** in adopting the tests for fair consultation proposed by **Hodgson J** in ***R v. Gwent County Council ex parte Bryant [1988]*** Crown Office Digest p.19, noted: ***"Fair consultation means***

(a) Consultation when the proposals are still at a formative stage;

(b) Adequate information on which to respond;

(c) Adequate time in which to respond;

(d) Conscientious consideration by an authority of the response to consultation.

Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matter about which it is being consulted, and to express its view on the subject, with the consultor thereafter considering those views properly and genuinely."

28. As a consequence, it seems to the Tribunal that the sending of the letter by the Respondent to **SISA** on October 26, 2018 was essentially pro forma, given the concluding paragraph of that letter which said: ***"In this regard and in accordance with collective bargaining protocols, the Company is notifying the Union of its intention to commence the consultation process with the Union*** **(emphasis added)** ***as is required under the Social Partnership Protocols and under the provision of the ERA at the earliest opportunity."***

_Similarly, the Respondent's letter to the Chief Labour Officer dated November 23, 2018 was in general terms. Significantly however, in the penultimate paragraph of that letter as shown at paragraph 12 above, the Respondent was stating on **November 23, 2018** that ***"The Company..... will begin the consultation process with the Unions (who have been informed by letter of 26 October 2018 of the restructuring process at the BAMC) and thereafter these details will be confirmed in writing to the affected employees"*** an explicit admission that consultations with the unions had not yet started.

29. As would have been noted in the chronology of events listed at paragraphs 7 to 19 above, the meetings between SISA and the Respondent only occurred in December 2018, three weeks before the intended date for redundancy, notwithstanding a request by SISA to the Respondent by letters dated November 8 and 19, 2018 to meet for **'meaningful dialogue'.** The Tribunal is of the opinion that if the Respondent had engaged with SISA on the November letters referred to above, it would have been in a better position to assert that the process of consultation had started on October 26, 2018 and accordingly was within the requirements of section 31 (6) (a) of the Act. The remarks of **Judge Levy Q.C** reproduced at paragraph 27 above, would seem to be particularly relevant in this matter.

30. The Respondent's reliance on the authorities mentioned in paragraph 26 above seems to be an attempt to suggest that the consultations which commenced on December 5, 2018 were concluded 'in good time' and so met the obligation that the consultation had been completed within a reasonable time, as required by section 31 (6) (a) of the Act. However, as the Tribunal noted at paragraphs 8 and 9 of its recent decision dated September 1, 2021 ***ERT 20/2019 Orville Wickham v. The Respondent*** that while the issues in ***Chefette*** focused on conduct, the statement by **Anderson JCCJ** at paragraph 45 of ***Cheffette,*** is applicable to the entirety of the ERA, which of necessity would include redundancy and the obligation to consult. Accordingly, in the context of the instant matter, the obligation to **consult** within the prescribed statutory parameters of the Act is obligatory, and it is erroneous to consider legislative provisions of other jurisdictions, particularly where there are clear and explicit provisions governing employer/employee relations in Barbados and provided for in the **Employment Rights Act.**

31. Section 31(6) of the Act provides that ***"The consultation referred to in subsection (4) (a) are consultations with the affected employees or their representative, being consultation conducted in accordance with the following requirements:***

The consultation shall commence not later than 6 weeks before any of the affected employees is dismissed and shall be completed within a reasonable time;" As a consequence, the Tribunal firmly dismisses the Respondent's submission that Section 188 (1A) of the Trade Union and Labour Relations (Consolidation) Act 1992 has any application to the instant matter, and **finds as a fact** that consultations between the Respondent and **SISA** commenced on December 5, 2018, a mere 27 days from the planned date for redundancy and dismissal of the selected employees of the Respondent.

32. The Tribunal has noted that other than the reference to the letter to the Chief Labour Officer, no material or evidence has been submitted that there was any consultation with the Chief Labour Officer as envisaged by section 31 (4) and (6) of the Act, and further that the role of the Chief Labour Officer has not been addressed or considered in any of the Respondent's Written Submissions.

33. The Tribunal considers it appropriate to refer to the decision dated August 23, 2019 in **ERT 2018/316** ***Shikelia Johnson v. Ian Griffith Mortuary Service*** and the statement at paragraph 7 thereof: ***"as the Respondent failed to carry out the consultations required by section 31.....the dismissal was unfair."***

34. The Respondent in Written Submissions dated July 1, 2021 and August 9, 2021 has also referred to what has been described as the Respondent's **special circumstances.** However, in the opinion of the Tribunal, **the special circumstances** defence, such as it is, is an alternative defence, when consultation is not possible. Section 31 (6) (c) provides that ***"where, in any case, there are*** *special circumstances* ***which render it not reasonably practicable for the employer to comply with any of the requirements of paragraphs (a) and (b), the employer shall immediately consult with the Chief Labour Officer and take all such steps towards compliance with the requirement as are reasonably practicable in all the circumstances."***

35. In the Tribunal's view, given the chronology detailed at paragraphs 7 to 19 herein, it was reasonably practicable for the Respondent to comply with the consultation requirements of

the Act, and consequently there is no basis for the **special circumstances** defence, given the facts of the instant matter.

36. On a consideration of the totality of the witness statements and the oral evidence of the Claimants and Mr. Leslie Parris on behalf of the Respondent, and the written submissions, the Tribunal has determined that the Respondent failed to carry out the consultations with SISA in accordance with section 31 (6) (a) and (b) of the **Act.** The Tribunal further determines that there were no special circumstances as per section 31 (6) (c) of the Act, as **the special circumstances** defence, is an alternative defence, and consequently the **special circumstances** defence has no application to the instant matter.

37. As a consequence of the foregoing, the Tribunal finds that the dismissal of the Claimants was unfair.

THE AWARD

38. The basis for an award to the Claimants is to be found in Section 37 of the Act which provides that the Tribunal shall make an award of compensation for unfair dismissal to be paid by the employer to the employee, and to be computed in accordance with the provisions of the Fifth Schedule.

39. Mr. Lewis, Attorney-at-law for the Claimants has also sought an award in accordance with paragraph 1(c) of the Fifth Schedule which is an amount, not exceeding 52 weeks' wages, where the dismissal was for a reason specified in section 30(1) (c), namely that the employee was.....***a delegate or member of a trade union.*** The submission also alleged that the Respondent did not adhere to the International Labour Organisation (ILO) Convention 135.

40. Article 1 of ILO Convention 135, the **Workers' Representatives Convention** provides that ***"workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representatives or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."***

41. At the beginning of this Decision, at paragraphs two to five, it was noted that each of the Claimants were members of **SISA,** and at paragraph seven, the Respondent explicitly recognized the existence of the Union by writing to the Union on October 26, 2018. However,

no evidence has been given to support the allegation that the Claimants were shortlisted for dismissal as a result of their membership of **SISA** or that the Respondent did not adhere to the International Labour Organisation (ILO) Convention 135. In the circumstances of the absence of both evidence and legal authorities on the matter, the Tribunal declines to make any award under paragraph 1(c) of the Fifth Schedule.

Edwin O'Neal

42. Mr. O'Neal's gross salary was $8,797.00 per month and he had been employed by the Respondent for nine (9) years. The basic award of two and a half weeks' wages, per 2 (2) (b) of the Fifth Schedule is $2,030.08x2.5x9 =$45,676.73. A payment of $23,878.58 for severance should be deducted, as stipulated at paragraph 5 (b) of the Fifth Schedule, leaving a net balance of $21,798.15 due to Mr. O'Neal.

Winston Bailey

43. Mr. Bailey's gross salary was $8,797.00 per month and he had been employed by the Respondent for eighteen (18) years. The basic award of three weeks' wages, per 2 (2) (c) of the Fifth Schedule is $2,030.08x3x18 =$109,624.15. A payment of $52,411.87 for severance should be deducted, as stipulated at paragraph 5 (b) of the Fifth Schedule, leaving a net balance of $57,212.28 due to Mr. Bailey.

Carol Bramble

44. Mr. Bramble's gross salary was $4,717.00 per month and he had been employed by the Respondent for twenty (25) years. The basic award of three and a half weeks' wages, per 2 (2) (d) of the Fifth Schedule is $1,088.54x3.5x25=$95,247.12. A payment of $76,458.28 for severance should be deducted, as stipulated at paragraph 5 (b) of the Fifth Schedule, leaving a net balance of $18,788.84 due to Mr. Bramble.

Philmore Gilkes

45. Mr. Gilkes' gross salary was $9,677.00 per month and he had been employed by the Respondent for nine (9) years. The basic award of two and a half weeks' wages, per 2 (2) (b) of the Fifth Schedule is $2,233.15x2.5x9 =$50,245.96. A payment of $24, 066.68 for severance should be deducted, as stipulated at paragraph 5 (b) of the Fifth Schedule, leaving a net balance of $26,179. 28 due to Mr. Gilkes.

ORDERS

46. The Tribunal orders that the Respondent the Barbados Agricultural Management Company Limited pay to the Claimant Edwin O'Neal the sum of $21, 798.15 by October 15, 2021.
47. The Tribunal orders that the Respondent the Barbados Agricultural Management Company Limited pay to the Claimant Winston Bailey the sum of $57, 212. 28 by October 15, 2021.
48. The Tribunal orders that the Respondent the Barbados Agricultural Management Company Limited pay to the Claimant Carol Bramble the sum of $18,788. 84 by October 15, 2021.
49. The Tribunal orders that the Respondent the Barbados Agricultural Management Company Limited pay to the Claimant Philmore Gillies the sum of $26,179.28 by October 15, 2021.
50. Each party to bear their own costs.

Dated this 15th day of September, 2021.

Christopher Blackman
Chairman

Edward Bushell
Member

Frederick Forde
Member