No. 20 of 2019

Between

Orville Wickham **Claimant**

Barbados Agricultural Management Co. Ltd **Respondent**

Before The Hon. Mr. Justice (ret'd) Christopher Blackman GCM; Q.C
Chairman

Edward Bushell, Esq **Member**

Frederick Forde, Esq GCM **Member**

On August 20, 2021

Miss Honor Chase, Attorney at law for the Claimant

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 Claimant was made redundant in December 2018.

BACKGROUND

2. The Claimant was employed by the Respondent on March 1, 2006 as Agricultural Manager and Head of the Agricultural department. By letter dated

December 27, 2018 he was terminated by the Respondent effective December 31, 2018. The reason given for the termination was that the Respondent had been directed by the Ministry of the Civil Service and the Ministry of Agriculture and Food Security to "*achieve greater efficiencies in its operations by way of restructuring ...as a consequence of the directive to achieve greater efficiencies the Company's operations will diminish, and your employment will be terminated."*

3. The Claimant asserts that he was not a member of a union, and further that he was not consulted with by the Respondent as an ***affected employee*** as provided for in section 31(4) (b) and 31 (6) of the Act. The Claimant acknowledged that he attended a **Heads of Department** meeting on October 18, 2018 when he was asked to provide the Human Resources Department with a full list of the positions and number of employees to be laid off, and that as such Head, he made recommendations regarding the retrenchment exercise for his department. In his evidence to the Tribunal, the Claimant stated that he provided to the Human Resources Department, the names of persons whom he considered should be retained to keep the Respondent viable. He said that the position of Agricultural Manager was included on that list, not the name of the person who held the post.

4. The Claimant conceded that by implication, the names of those persons **not** included in the list which he had prepared, could be considered as the names he thought may be retrenched or made redundant. Both in his Witness Statement and evidence in chief, the Claimant categorically stated that at no time during his attendance at meetings with the management of the Respondent Company was he informed that he too may be dismissed and/or that his post will be made redundant. The Claimant in his Third Witness Statement dated August 16, 2021 noted that he was not invited to the SISA meetings on December 5, 12 and 19,

2018 and that he was unaware that his name had been included in the list of persons to be made redundant. The Claimant further noted that SISA was not obligated to inform him that his name was on a list.

5. Mr. Leslie Parris, who filed a Witness Statement on behalf of the Respondent and in his own evidence in chief, said that he did not tell the Claimant that he will be made redundant. He further stated under cross-examination that the list submitted by the Claimant had a shortfall of over one million dollars in the expenditure to be cut, but that he had not discussed this with the Claimant nor indeed had he any meetings with the Claimant on what had been submitted.

6. Mr. Parris agreed with Counsel for the Claimant that Dr. Wickham had never attended meetings which the Respondent held with the Sugar Industries Staff Association (SISA). When asked who had included the Claimant's name in the list given to SISA on December 5, 2018, Mr. Parris replied that that decision had been taken by those senior to him. However, he justified the inclusion of the Claimant's name in the list passed to SISA on the basis that the Claimant was 'a beneficiary' of any negotiated settlements with the union, and consequently it was appropriate that the action which had been taken, had been done.

7. Mr. Deighton Marshall, the Industrial Consultant for the Respondent, in an amended Skeletal Argument **(the Argument**) on behalf of the Respondent dated August 9, 2021 posed the question at 1.3 of **the Argument** "*Can the trade union representatives be the appropriate representatives for collective consultation purposes where the affected employees are not union members?"* Mr. Marshall answered in this manner: *"Good industrial relations practices say yes. In fact, for further guidance on what has been the practice and law in UK, we can be guided by Section 188 (1B) of the Trade Union and Labour Relations (Consolidation) Act 1992."* Further on, in **the Argument** at paragraph 1.3 c

there is the statement *" ...in order to further comply with the consultation process and good industrial relations practice, a copy of the list of persons to be made redundant included the Claimant Dr. Wickham. This list was given to Sugar Industries Staff Association (SISA) at the first meeting with the Association on 5 December 2018."*

THE LAW

8. The Caribbean Court of Justice **(CCJ)** in its seminal decision in ***Chefette Restaurants Limited v. Orlando Harris*** [2020] **CCJ 6 (AJ) (BB)** observed at paragraph 45 that "*Whatever may be the position in Antigua and Barbuda, neither the **Polkey** principle, nor the 'band of reasonable responses' test associated with **Whitbread,** has any place in relation to the procedural requirements for dismissal under the ERA of Barbados. Those procedures are mandated by the Parliament of Barbados in the ERA which it adopted in 2012 to 'to make new provision for the rights of employed persons and for related matters.'*

9. Whereas the issues in ***Chefette*** focused on conduct, The Tribunal is of the view that the foregoing statement is applicable to the entirety of the ERA, and in the context of the instant matter, the obligation to **consult** within the prescribed statutory parameters is paramount. A deviation from the legislative framework for consultation, renders a decision untenable. Against that premise, the Tribunal firmly dismisses the Respondent's submission that Section 188 (1B) of the Trade Union and Labour Relations (Consolidation) Act 1992 has any application to the instant matter.

10. As a consequence, the Tribunal considers the admission in **the Argument** that the Claimant's name was included in a list *to further comply with the consultation process and good industrial relations practice,* was disingenuous in the extreme, and a deliberate attempt to short circuit the statutory obligation

in section 31(4) of the ERA to consult the employee, who is not a union member.

11.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 is 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 who are to be dismissed and to mitigate for them the adverse effects of the dismissals; and***

(a) 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.

12. The Respondent has contended that in the circumstances the Claimant was consulted as Head of Department about the reduction in the Government subvention and the need for 'a drastic reduction in wages and salaries', he had been consulted during the redundancy.

13. The Tribunal finds no merit in this argument. Firstly, as Mr. Parris conceded no discussions were held with the Claimant on the list he had submitted. See paragraph 5 above. Secondly, a discussion with the Claimant as Head of Department is not the consultation required by section 31 (4) and (6) where the employee is not a member of a union.

14. The significance of consultation pursuant to the provisions of the **Act** have been considered in three decisions of the Tribunal: **ERT/2014/064** ***Cutie Lynch v. National Conservation Commission et al*** **dated 15 July, 2016;** ***ERT /2018/316***

Shikelia Johnson v. Ian Griffith **dated 23 August 2019** and ***Michelle Cox-Jordan et al v. Little Switzerland*** **dated 27 August 2020** and are adopted herein.

15. In the instant matter, in the context of the admission by the sole witness for the Respondent that there was no consultation at any time with the Claimant as required by the Act, and the statement in the Argument shown at paragraph 7 above, the purported dismissal by reason of redundancy resulted in the dismissal being unfair, and we so determine and hold.

The Award.

16. The basis for an award to the Claimant is to be found in Section 37 of the Act. Section 37 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.

17. The Claimant's monthly salary at termination was $13, 505.01 and he had been employed by the Respondent for 12 years.

18. In relation to the basic award of three weeks' wages for each year where the period of continuous employment is 10 years or more but less than 20 years, as provided for in paragraph 2 (2) (c) of the Fifth Schedule, the calculation is $3,116.54 x3x12 =$**112,195.47**

19. At paragraph 134 of ***Cheffette,*** the Court 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. The Claimant through his Counsel has claimed allowances for: (i) a 50 month period, totaling $71,950.50,

(ii) loss pension of $135,050.00 being $2701.00 per month for 50 months and (iii) recovery of medical costs totaling $19,200.00. Vouchers in respect of these costs were submitted.

20. In his evidence in chief in response to questions from the Chairman of the panel, the Claimant disclosed that the 50 month period relied upon in his claim, was that from December 2018, the time of his termination to February 2, 2023, the date upon which he would attain the age of 67 and would have retired from the Respondent company, had he not been made redundant. The Claimant agreed that it was not a settled matter whether the age of 65 or 67 was the operative date for retirement for employees of state owned enterprises. In any event he admitted that on attaining the age of 65, he was in receipt of a pension through Sagicor, on behalf of the Respondent of $1200.00 per month and a reduced NIS pension of $1,800.00.

21. The Tribunal finds it incongruous that a Claimant's benefits under paragraph 1 (b) of the Fifth Schedule, as claimed in this matter, should almost equate to that of the basic award. Allowances are in essence part of the salary of the Claimant. As the decision by the **Caribbean Court of Justice** in ***Chefette*** did not give any guidance as to how benefits are to be computed, the Tribunal in the absence of agreement by the parties as occurred in ***Michelle Cox-Jordan et al v. Little Switzerland,*** adopts the following formula to determine the value of benefits under paragraph 1(b) of the Fifth Schedule.

22. The Claimant's monthly salary was $13,505.01 and with allowances totaling $1,439.01, amount to $14,944.02. That amount multiplied by 12 equals $179,328.24 which is then divided by 52. The result of $3,448.62 is then multiplied by 3 (being the 3 weeks used in paragraph 18 above, and further by 12, being the number of years worked, resulting in a final figure of $124,150.32. The basic award sum of $112,195.47 is deducted from $124,150.32, to arrive at the sum of **$11,954.85,** the value of the allowances. The Tribunal finds the medical claim appropriate and accepts the sum of

$**19,200.00** **c**laimed. Accordingly, the Tribunal awards to the Claimant, pursuant to paragraph 1(b) of the Fifth Schedule, the sum of $31,154. 85.

23. In the circumstances of the pension arrangements admitted to, the Tribunal declines to make any award in respect of a pension to the Claimant.

24. The amount due by the Respondent to the Claimant is the aggregate of:

(a)	Basic award	**$112,195.47**
(b)	Benefits per 1 (b) of the Fifth Schedule	31,154. 85
		$143, 350.32
Less per paragraph 5 of the Fifth Schedule to the ERA.		$30,493.15
		$112,857.17

25. The Tribunal directs that the sum of $112,857.17 be paid by September 30, 2021.

26. Each party to bear their own costs.

Dated this 1st day of September, 2021

Christopher Blackman

Chairman

Edward Bushell **Frederick Forde**

Member **Member**