Employment Rights Tribunal

CASES • IN • REVIEW

Volume II

Putting the CONSULT in consultations

To re-instate... or re-engage?

Progressive Discipline

A compilation of cases heard before the Employment Rights Tribunal of Barbados.

BEC
Barbados Employers' Confederation

Barbados Employers' Confederation

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5 cases

3 topics

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"Promoting Excellence in Employment"

WE ARE PLEASED TO PRODUCE VOLUME II OF ERT CASES IN REVIEW

One pivotal role of the Barbados Employers' Confederation (BEC), as a busines support organization, is to assist employers in being compliant with local labour legislation.

While merely missing one step in the disciplinary process may seem insignificant; what appears to be the simplest of missteps, often proves very costly to even the smallest organizations.

It is our goal at the BEC to provide you with the necessary information and tools to assist you in managing your operations in such a way, that you avoid successful unfair dismissal claims.

Having been in operation for over 6 decades, the BEC has a membership base of over 200 businesses across Barbados. The BEC's services include advice / guidance, training; and tools like this publication that simplify the requirements, procedures and expectations of navigating the employment relationship.

Part I of this series took an extensive look into the first four (4) unfair dismissal cases and the subsequent decisions of the Employment Rights Tribunal (ERT).

Volume II of this publication will provide a comprehensive overview of 6 more cases heard by the ERT between 2018 and 2021 to further examine some of the nuances employers should be mindful of when carrying out successful disciplinary and termination procedures.

You will find that this in-depth analysis of unfair dismissal claims will also reveal precedents set by the ERT in the examination of facts of the cases.

AT THE TIME OF PUBLISHING, THE EMPLOYMENT RIGHTS TRIBUNAL HAS MADE DECISIONS REGARDING UNFAIR DISMISSALS IN 27 CASES.

THE EMPLOYMENT RIGHTS TRIBUNAL WAS ESTABLISHED FROM THE ACT, WHICH WAS PROCLAIMED IN 2013

AS AT MARCH 31ST, 2022, THE TRIBUNAL HAS HEARD AND MADE JUDGEMENTS ON 27 CASES

DID YOU KNOW ?

The Employment Rights Tribunal has the same power and status as the magistrate court!

Defined as the state of being no longer needed or useful, redundancy occurs when the job an employee was employed to perform no longer exists.

Here are some factors that warrant redundancy:

- If the business has experienced poor economic performance
- Positions within the business are no longer valid due to financial cuts
- There was natural disaster
- The business made some significant changes to its product, service or purpose
- The business made changes to its processes
- Change in location or closure of business

Putting the CONSULT in consultations!

As outlined in Section 31 of the Employment Rights Act, the following must be adhered to when employers contemplate making 10% or more of their staff complement redundant.

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 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, 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

(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 following cases emphasize the need for consultations with affected persons in circumstances relating to redundancy.

Case #1 Michelle Sonia Cox-Jordan et al V World Gift Imports (Barbados) Ltd. trading as "Little Switzerland"

Name	Position	Service
Ms. Cox-Jordan	Assistant Manager	Twenty-one (21) years
Ms. Yearwood	Sales Consultant	Twenty-one (21) years
Ms. Bascombe	Sales Consultant	Eleven (11) years

These former employees were terminated on March 24, 2017 due to redundancy.

The Facts

The employer's representative argued that the rationale for workforce reduction was:

1. The company absorbed all staff following the closure of its second branch in November 2016, thereby having 27 persons in total.
2. This increased staff complement at one location, was now too great to support in contrast to the business being generated by the company.

Given this business decision, the company met with the Chief Labour Officer to discuss the impending restructuring exercise, stating that they could not comply with all requirements and needed to invoke the special circumstances provision. During those discussions, the company indicated that they were advised that the company remit payment of six weeks wages to each employee to mitigate the effects from the lack of consultation. Following this, the company arranged a meeting with the representative trade union to also discuss the terminations. The employees were made redundant that same afternoon after concluding that meeting in March 2017.

The representative for the claimants, relying on key legal precedents which were noted in other cases, indicated that where situations such as these arise, good industrial relations practice warranted that the employer provide as much warning as possible of impending redundancies. This would allow the union and affected workers enough time to take into consideration all factors. By ensuring that the selection criteria is made fairly - including evaluation against other variables such as attendance, experience, and tenure - the desired outcome would be achieved, with little hardship to the employee.

Additionally, the claimant's representative noted none of the correspondence, to the Chief Labour Officer or either the union, made mention of the any special circumstances which caused the employer to be unable to comply with the consultation period/provision. The argument of special circumstances was expressed by the company only through the witness statement of the employer representative which were listed as security, competition, confidentiality and risk associated with the same.

The Claimant's representative again, relying on legal principles, noted that where the special provisions clause in Sec 31 (6) (c) is invoked, then this should be something out of the ordinary that has occurred which makes it difficult for the employer to comply. For example, a sudden disaster causing the business to become insolvent as opposed to a gradual run down of a company becoming insolvent.

The Decision

Following submissions, the Tribunal in their assessments found that the company failed to make the appropriate business decisions between November 2016 and March 2017 to consult with the employees given the gradual decline in business. The Tribunal further announced that the role of the Chief Labour Officer (CLO) is conciliatory and therefore has no authority to agree to any proposals to mitigate and insulate the adverse effects of the terminations. They noted in their findings that the appropriate response by the CLO should have been "I note what you have said; however, I am unable to give you any advice on your proposal. That is a matter for you to discuss with the employee and the Union."

In response to the special circumstances, the Tribunal noted that the reasons given by the employer were anodyne in character and in essence was not something out of the ordinary or uncommon, and therefore the reasons produced by the company were not accepted as "special circumstances".

Given their analysis of the case and the process as outlined by the Employment Rights Act, the Tribunal ruled that the claimants were unfairly dismissed.

redundancy

CASE #2 SHIKEILA JOHNSON V IAN GRIFFITH MORTUARY SERVICE

Another case of termination due to redundancy is Shikeila Johnson v Ian Griffith Mortuary Service. The employer noted that the role which Ms. Johnson performed of Mortuary Assistant had been made redundant and they offered Ms. Johnson the post of Receptionist at a lesser salary. Ms. Johnson refused and was terminated by way of redundancy.

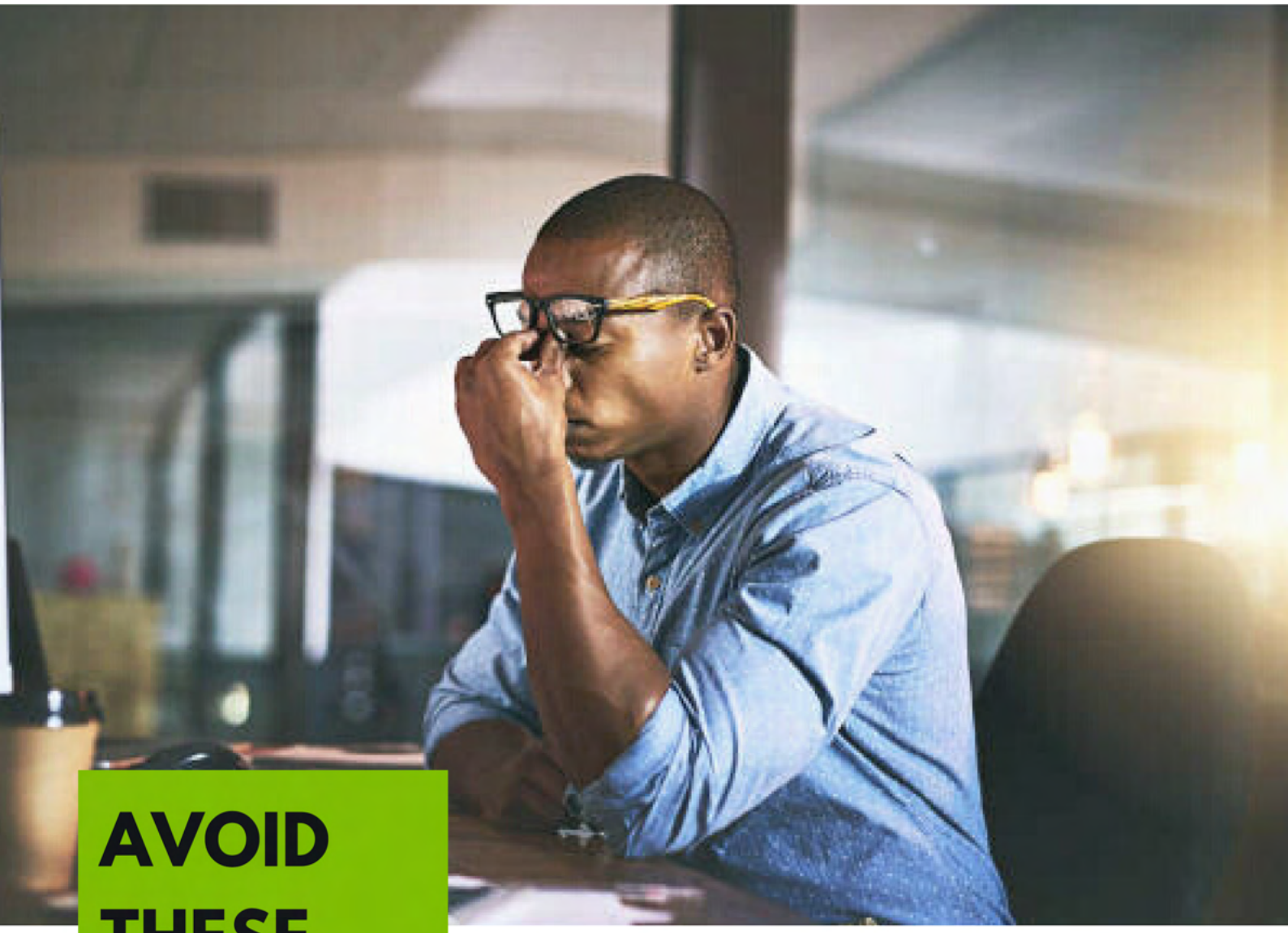
Given the small staff complement at the company, her redundancy equated to more than 10% of the workforce. Ms. Johnson's representative noted that the company failed to comply with the process outlined in the Employment Rights Act, 2012 (ERA) regarding redundancy and this failure to comply made the termination unfair.

The representative on behalf of the company argued that the intent behind the legislation is for consultation to occur where significant numbers are impacted and not where a single individual is made redundant. This argument relied on the UK legislation which noted that there is no statutory requirement for collective consultation where the redundancies involve less than 20 employees.

The Decision

The Tribunal having reviewed the submissions and noting that the Barbados legislation offers no concessions as such in the UK, the ERT indicated that while much of the argument put forward by the representative on behalf of the company may very well be true, had it not been for non-compliance with the statutory requirement to consult, the termination may have very well been fair.

Therefore, having not followed the process outlined by the law the Claimant was found to have been unfairly dismissed.



AVOID THESE PITFALLS

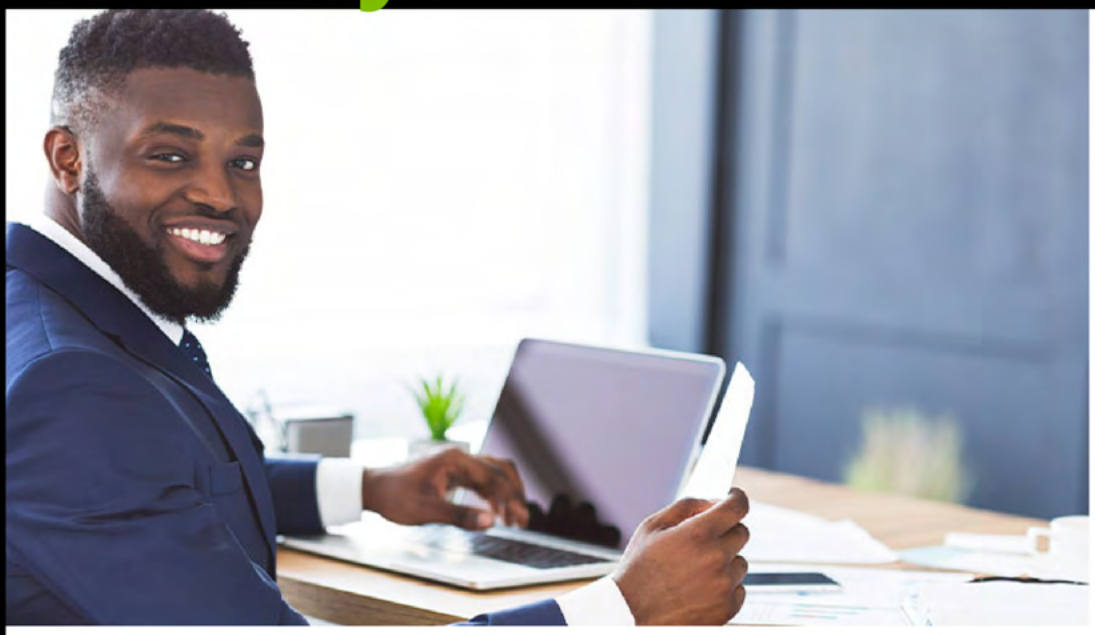
These cases have shown that employers must consistently follow the process and engage in the necessary consultations that are required when making 10% or more of their workforce redundant.

It is critical that a comprehensive and ongoing analysis of the business is done to ensure that there is enough time to comply with the outlined provisions. The above-mentioned cases highlight that when making a case for special circumstances the circumstances should be extraordinary or so uncommon that it would warrant exclusion or special preference. Where employers cannot show or prove special circumstances, it is best to stay the course and consult, consult and consult again before terminating.

DO	DON'T
Engage in consultations for 6 weeks unless there is a significant case for invoking the special circumstances clause and consult with the CLO.	Pay six (6) weeks pay in lieu of consultation.
Send written correspondence to the employee and the CLO (Chief Labour Officer) detailing all that is required in Sec 36 of the ERA.	Only write to the CLO.
Meet with staff and/or representatives to discuss the criteria and other concerns surrounding the redundancy.	Meet only with the CLO.
Ensure each meeting is documented and shared with all parties highlighting what was discussed and agreed.	Fail to document your consultations.
Only use redundancy as outlined in the ERA in Section 31	Use redundancy where a termination is for misconduct.

Use this checklist

Did you know?



The powers of the Chief Labour Officer (CLO) may be considered vast and far reaching.

- CLO or his designate can arrive at a business and ask the employer to see his employment records for his employees and he/she must comply.
- Where employers are not in compliance with the relevant labour legislation, he can instruct them to do so within a specific timeline before sanctions or the prescribed fines are imposed.
- The CLO's office is used to conciliate disputes between trade union and companies. Where the matter cannot be settled at that level it is escalated to the Minister of Labour.

The CLO conciliates matters of unfair dismissal claims and where these too cannot be settled, they are escalated to the Tribunal for decision.

Unlike the previous cases, in **Sylvan Griffith v Coronation International Golf Limited**, the Claimant Mr. Griffith argued that he had been unfairly dismissed from his post as an Executive Sous Chef. However, the Tribunal ruled that the termination was in fact fair.

The claimant was hired on January 23, 2015 and was made redundant on September 30, 2017.

The company at that time had approximately 122 staff members and Mr. Griffith was the only person to be made redundant. His redundancy was also determined based on the fact that he was employed at a rate of $40.00 per hour to prepare meals which could be considered fine dining. The company in their submission, maintained that to remain viable, this restructuring was necessary; such that the person who was employed following Mr. Griffith's termination made only sandwiches and burgers at a rate of $11.00 per hour which was a significant factor given losses were accruing for a while.

When Consultation is Not Required

LEGITIMATE REDUNDANCY

Financial constraints, and the shift in product offerings

REDUNDANCY IS LESS THAN 10% OF STAFF

Mr. Griffith represented 8% of the staff complement

PROCESS IS FOLLOWED THOROUGHLY

The company was compliant with the legislation

The company also ensured all statutory entitlements were provided to the employee.

The Tribunal in their assessment noted that the employee was not unfairly dismissed as the employer did not contravene any of the rights conferred to the employee in Sec 27 of the ERA. They also found that the employer was in compliance with Sec 31 of the Act, the employer did not need to engage in consultations as less than 10% of the workforce was impacted.

To RE-INSTATE or re-engage?

That is the question

Where employers are found to have unfairly dismissed an employee, the remedy to address this is to first look at the possibility of re-instatement or re-engagement as outlined in the ERA. As we delve into this case, we take a look at the rationale for either awarding reinstatement/re-engagement or a monetary award.

RE-INSTATEMENT

Section 34 of the ERA

This is where an employee resumes their duties with a company following dismissal, in the same position. All benefits and entitlements inclusive of tenure remains unchanged. It is as though they never left.

RE-ENGAGEMENT

Section 35 of the ERA

This refers to the re-introduction of an employee to the company following dismissal. However, they are given a different post / job with similar compensation and benefits. However there is a new date of employment.

CASE #4 VICKY CHANDLER V BARBADOS TOURISM MARKETING INC. (BTMI)

In Vicky Chandler v Barbados Tourism Marketing Inc. the Claimant was employed by the Barbados Tourism Authority (BTA) from April 1, 1998 until August 2014 in different capacities with her last assignment being that of Marketing Executive.

When the BTA ceased to exist in April 2014, functions and responsibilities were transferred to the Barbados Tourism and Marketing Inc. (BTMI).

The Claimant was later hired as a Director from August 25, 2014, (i.e Director of Marketing) with the BTMI but following her refusal to transfer to the post of Director of Cruise she was subsequently terminated in August 2016.

The claimant was notified by the Chief Executive Officer that the Board of Directors had decided to transfer her to the post of Director of Cruise to which she declined. She received written correspondence indicating that if she did not comply with the transfer order it would be deemed an act of insubordination. Having not responded, she was invited to a disciplinary meeting and was subsequently terminated on August 11, 2016.

As the matter was forwarded to the Tribunal for discussion and decision, the representative on behalf of the company conceded that the dismissal was unfair and that the disciplinary meeting was procedurally irregular.

Based on this admission, the Tribunal was now faced with considering the appropriate remedy to award the Claimant. The Claimant was seeking re-instatement to her former post of Director of Marketing. Her representative stressed that the Tribunal should give recognition of the fact that re-instatement or re-engagement are the primary remedy for unfair dismissal in accordance with the ERA.

While the Tribunal did take note of this, they were also tasked with taking into account whether it was **practicable** for the employer or its successor, to comply with an order for re-instatement or re-engagement, as the case may be.

Relying on the authorities of previous cases such as Johnson v Griffith, it is clear that tribunals have a wide discretion in determining whether or not to order re-instatement or re-engagement.

> The tribunal, in considering whether to make a re-instatement order, must exercise its judgment on the practicability of the employer's compliance with the order.

practicable

[ˈpraktɪkəb(ə)l]

ADJECTIVE

able to be done or put into practice successfully.

"the measures will be put into effect as soon as is reasonably practicable"

synonyms: practical · workable · achievable · attainable · realizable · viable · realistic · sensible · reasonable · within reason · within the bounds of possibility · useful · suitable · expedient · helpful · constructive · accomplishable

Re-instatement means the contractual rights, the terms and conditions of employment must be re-instated, and the rights and privileges (such as seniority and pension rights) must be restored to the employee under a re-instatement order.

Tribunals recognize that in practice little purpose is served by forcefully re-uniting an employer and former employee in circumstances where they are unlikely to be able to rebuild the necessary relationship of trust and confidence.

THE DECISION

Owing to the legal authorities to consider re-engagement/re-instatement and the fact that there was also no evidence to support the practicability of re-instatement; the Tribunal declined to make such an order and the Claimant was awarded compensation in line with the Fifth Schedule of the ERA (Section 37).

Where the practicability of re-instatement or re-engagement of the complainant is too remote (not foreseeable), an order for re-instatement or indeed re-engagement would, in the circumstances, be nugatory.

CASE #5 THE LANDMARK APPEAL

The decision handed down on July 30, 2019, was on the lips of employers and employees alike following the unfair dismissal judgement in favour of Ms. Debra Brathwaite (The Claimant). This judgement saw an award of BDS$303, 570.29.

In **Debra Brathwaite v First Citizens Bank (Barbados) Ltd.** the claimant Ms. Brathwaite worked with the company for approximately 28 years and was employed at the bank through all of its transitions, having been transferred from the Barbados Mutual Life Assurance Society to the Mutual Bank, which was then purchased by Butterfield Bank before First Citizens Bank took over in 2001.

The claimant was employed in the role of Foreign Business/Term Deposit Loan Clerk and she had three accounts with the bank as showed below:

- A current account 50000770002, to which her salary was lodged.
- A current account 50094500002 and
- A savings account 10000199433

Having become a Settlement Officer in 2008, she was asked to act as a Senior Settlement Officer in June/July of 2013. During that time in July, she had set up an automatic transfer of BDS$500.00 from one account to another to facilitate payment of her university fees. In July, 2015 when the acting assignment was over, Ms. Brathwaite cancelled the transfer she had setup in the system.

Given the financial institution had upgraded its security system/ technological software over the years, this transaction in the system was now flagged given the cancellation. Following this Ms. Brathwaite met with Mr. Gill of the Operations Risk Department of the bank, who asked whether she knew it was against bank policy for an employee to process transactions with their own accounts to which she noted not to her knowledge.

Following that initial discussion, there were a number of meetings held with Ms. Brathwaite which included investigatory and disciplinary meetings before her termination on February 08, 2016.

The Tribunal in their rationale ruled that the dismissal was unfair, and relied on the following reasons:

- The same persons who investigated the matter, also sat as a part of the disciplinary meetings
- The fact that Mr. Gill, who originally spoke to Ms. Brathwaite (the original investigator), formed part of the disciplinary panel
- The Company's reversion to an investigative committee to bring new charges against Ms. Brathwaite in her absence

These points were taken into account to show the procedural irregularities by the Company in handling the matter. Additionally, the Tribunal noted that their decision also took into consideration the fact that;

- The claimant Ms. Brathwaite readily explained what she did when the matter was first drawn to her attention in August
- She apologized and admitted to her action in the letter outlined in November
- There was no attempt to defraud the bank
- She had a clean employment record for the 28 years employed with the bank, but for one (1) warning letter of May 2014

Given this, the claimant was awarded BDS$303,570.29 which not only comprised of the basic award of the fifth schedule of the Employment Rights Act, but it also included loss of wages as deemed by the Tribunal as the Claimant was still unemployed, 41 months after the dismissal.

The bank appealed the decision of the Tribunal at the Court of Appeal. The grounds for appeal were on the main premises that the Tribunal erred in law, making the findings of law such that the appellant did not follow a fair process in dismissing the respondent because:

- She was not invited to one of the investigative meetings which led to her dismissal
- The same officers were panelists on both the investigative and disciplinary meetings
- The officer who conducted the initial investigation sat in the disciplinary hearings
- It was procedurally unfair and in breach of the rules of natural justice to make findings leading to a decision at the conclusion of evidence, but without allowing the appellant to make formal submissions
- In applying the correct test for determining the respondent's dismissal
- The decision to award the respondent her salary for the entire period after dismissal

In their findings, the Court of Appeal found that while it was desirable to keep the two (2) functions of investigation and discipline and the personnel involved in both, separate, the mere conflation (i.e. mixing the parties) without more substance could not automatically determine unfair process which includes the rationale for Mr. Gill.

Similarly, the Court further noted that they were not persuaded that the absence of the respondent employee from the investigatory meeting amounts to procedural infelicity. They noted the traditional suspension of employees from the workplace pending investigations lent some credence to that view and relying on legal precedence essentially found that no issue with the employee being absent from that investigatory meeting.

While it is advised to have separate persons handle each stage of disciplinary process, i.e, investigation, hearing and appeal, it is not automatically unfair should resources make the separation of function impractical.

However, the Court upheld the unfair dismissal reasoning relying on the dicta of Lord Browne Wilkinson as well as the three-prong test of reasonableness and found that the decision of dismissal of the bank did not fall into the range of reasonable responses by the employer.

The Court noted "taking all the relevant circumstances into account; the nature of the conduct as expressly categorized by the appellant employer; the range of sanctions provided therefore by the employer; the technically unblemished nature of the respondent's work record over a substantial period; the fact that no dishonesty on the respondent's part was alleged; and the fact that the appellant suffered no financial or reputational loss in consequence, we are of the view that the appellant has not established that any reasonable employer, identically situated as it was, would have dismissed the appellant or, more accurately put, would have included the sanction of summary dismissal within the range or background set of reasonable responses to the respondent's conduct here."

The Highlight of this Appeal

In addition to the precedent now set in relation not only to the basic award, but also to fringe benefits and a punitive award in the limited circumstances where appropriate, the judgement made it abundantly clear that as lost wages are already compensated in the amount of the basic award, there is no need to include wages in the meaning of benefits.

Although the ERT may award an amount it thinks fit in respect of benefits *other than future wages* that might have been had but for the dismissal, it would be for the unfairly dismissed employees to identify the benefits they claim. The reason why this distinction that wages are ***not*** to be included in the calculation of benefits is so important, is that this approach has historically been taken by tribunals, absent specific guidelines to be followed to avoid excessive awards, thereby leading to the making of compensatory awards that were disproportionate and excessive.

Fresh on the heels of vindication of employers' long-held position on the quantum of awards, came some clear warnings to employers, that the provisions of the Act must be adhered to and that the ERT is not a body with which to trifle. As has been recognised from its inception, the ERA is highly procedural and whilst employers continue to raise concerns about how time consuming and administratively onerous compliance with the Act can be, this judgment makes it crystal clear that employers must be prepared to do so or be shown the error of their ways.

The bottom line is that due process matters and employers ***must*** comply with their procedural obligations as set out in the Fourth Schedule of the ERA. Failure to do so has in most, if not all cases, resulted in a finding of unfair dismissal. In dealing with a termination, employees must be afforded their rights under the law, and employers must be able to clearly demonstrate that progressive discipline was applied except in cases of summary dismissal.

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