NP2022-094

INDUSTRIAL TRIBUNAL

COURT #5 SAFFREY SQUARE, EAST & BAY STREETS, NEW PROVIDENCE

COMMONWEALTH OF THE BAHAMAS

Before

RIONDA Y. GODET Vice President

(Sitting Alone)

ANNALEE DAWKINS

Applicant

AND

ISLAND HOTEL COMPANY LIMITED

Respondent

RULING

APPEARANCES

For The Applicant	Ednel Rolle Obie Ferguson & Co - Advocate
For The Respondent	Kenneth Lightbourne Island Hotel Company – Attorney

The Applicant Annalee Dawkins was hired by the Respondent from October 1988 as a waitress in the Casino Beverage Department. She claims that she was terminated without knowledge and this information only came to light when she was urged by a colleague to check her bank account as some persons at the Respondent company were being made redundant. Upon doing so, she found that the sum of $7,076.59 had in fact been deposited to her account.

She testified that the Respondent alleged they tried to contact her numerous times by cellphone and email without success, hence they sent monies to her account when they could not reach her. She found this assertion 'ludicrous' as neither her cellphone number or email had changed.

The Respondent for its part states that around November 2021, it was faced with numerous challenges arising from loss of business due to the global pandemic, which resulted in many employees being laid off and placed on furlough, including the Applicant. Accordingly, and so as to ensure the financial stability of the company, a decision was made to reduce the work force. To this end, the Respondent informed both the Minister responsible for Labour and the President of the Bahamas Catering and Allied Worker's Union concerning the proposed redundancies. According to the Respondent, its efforts undertaken to contact the Applicant directly proved futile, and as a result, a redundancy payment in the sum of $7,076.59 was paid to her account, thereupon bringing an end to her employment.

REVIEW OF THE APPLICANT'S EVIDENCE

The Applicant, being duly sworn, when turned over to Cross Examination agreed that she received funds totaling over $7,000 and that she did not return those funds. She agreed that she was on furlough from March 19th 2020 due to the Covid pandemic and that during this time, she received unemployment benefits from National Insurance up until November 25th 2020, when she received the $7,000+.

Her evidence inter alia went along this course:

Q YOU INDICATED THAT YOU RECEIVED FUNDS TOTALING OVER $7,000?

Yes I did

Q YOU DID NOT RETURN THOSE FUNDS?

No. I did not

Q AND DID YOUR ADVOCATE EXPLAIN WHAT THOSE SUMS REPRESENTED?

No, he didn't

Q YOU HAD SOME INDICATION THAT IT MAY HAVE BEEN FOR REDUNDANCY PAY?

Somewhat. I did not know the money was on my account until a co-worker of mine came to me and said I had money on my account. That was in December.

Q YOUR WITNESS STATEMENT SAYS SHE SAID YOU HAD MONEY PAID BY THE COMPANY?

I did not believe her because I felt like if they were going to post it to my account, they should have said something to me, but I did not believe her because my Supervisor should have called me and said something because she, being a line staff like me, that's why I did not believe her.

Q BUT YOU CONFIRM THAT SHE ADVISED YOU SOME POSITIONS WERE BEING MADE REDUNDANT AT THE TIME?

Something like that. She said some people had been made redundant. I did not believe to my mind that it would have been me. I waited a while before I checked it.

Q PRIOR TO RECEIVING THOSE FUNDS BEFORE SPEAKING WITH YOUR COLLEAGUE, YOU WERE HOME ON FURLOUGH. CORRECT?

Yes, I was.

Q AND YOU WERE ON FURLOUGH FROM 2020 DUE TO COVID?

Yes. From 19th of March 2020.

Q AND DURING THIS PERIOD YOU WERE ON FURLOUGH, YOURECEIVED BENEFITS FROM NIB?

Yes, I did.

Q IS IT OK TO CALL IT UNEMPLOYMENT BENEFITS?

That is what it was

Q AND YOU RECEIVED THOSE PAYMENTS UP TO THE DATE OF RECEIVING THE $7000 +?

Yes. I guess so, the NIB payment, then the $7,000K came the 25th of November 2020.

Q BUT PRIOR TO THAT YOU WERE GETTING NIB?

Yes.

REVIEW OF THE RESPONDENT'S EVIDENCE

On this point, the Respondent's principal witness was Horatio McKenzie, who, in referring to Paragraph 9 of his witness statement, averred that due to the decision to reduce its workforce, the Respondent kept in contact with the Minister responsible for Labour and with the Union, albeit, he would not have been in possession of, nor aware of whether a response was had to the letters addressed to the Union and the Minister of Labour as touching the intended redundancy exercises.

The following questions ensued:

Q WERE YOU INVOLVED IN NEGOTIATIONS WITH THE UNION REGARDING REDUNDANCY?

No sir.

Q SO – WOULD YOU BE AWARE IF THE COMPANY AGREED A SELECTION PROCESS REGARDING WHO WOULD BE MADE REDUNDANT?

In my role, what result came out of negotiations, I would be forwarded the same.

Q SO ARE YOU AWARE OF WHETHER OR NOT THERE WAS A SELECTION PROCESS AGREED TO BETWEEN THE UNION AND THE COMPANY?

I would assume so, as the next page has a memo going to Mr. Woods as to locations and individuals that would fall under this issue from Mr. Lightbourne. Based on this document, with me being copied there on, yes.

Q ARE YOU AWARE HOW MANY WAITRESSES OPERATED WHILE YOU WERE THERE ON THE CASINO BAR?

I don't have that number readily available

Q DO YOU KNOW IN TERMS OF SENIORITY, WHAT LEVEL OF SENIORITY MRS DAWKINS HELD?

She would have been a level 9 employee so seniority in this regard was not a factor. She would have been identified, as every other employee, as a cocktail waitress – not as a senior cocktail waitress.

Q SO THAT'S YOUR ANSWER? SENIORITY DOES NOT COUNT FOR THE POSITION YOU HOLD?

In her capacity on the casino floor, we do not recognize persons based on their seniority. She would have been recognized the same as other cocktail waitresses on the floor.

Another line of questioning ensued, as the Advocate for the Applicant referred to Paragraph 10 of Mr. McKenzie's witness statement thus:

10 As a result of the aforementioned, I (responsible for Food & Beverage) attempted to call Ms. Dawkins to notify her of the dismissal by contact the number on her employee file (i.e. (242) 535-8618). I however, was unable to reach the Applicant to advise her of the dismissal. Thus, I spoke with her managers who were unable to provide me with a different number for Ms. Dawkins, which proved unsuccessful.

The questions continued:

Q TELL THE COURT HOW MANY TIMES YOU ATTEMPTED TO CALL MRS DAWKINS

I do not recall how many times.

Q YOU SAID YOU REACHED OUT TO HER MANAGERS.

Yes. I reached out to her managers.

Q IS THIS MISS RODEISHA ADDERLEY?

Yes. That's Mrs. Adderley.

Q DID YOU ATTEMPT ALSO REACHING HER VIA EMAIL?

No sir. We only made the attempt to reach her by phone.

Q DID YOU ATTEMPT TO CALL HER SEVERAL TIMES THAT WEEK OR JUST THAT DATE?

I do not recall.

Q CAN YOU CONFIRM WHETHER MRS. DAWKINS EVER RECEIVED HER TERMINATION LETTER?

I cannot confirm that.

When asked by the Tribunal whether there was a threshold of efforts to reach the Applicant that was set, the witness responded:

I would have recalled the process being we would have been issued a list with contact information. We would have gone through the list from top to bottom making attempts to contact employees. Once we would have reached the end of the list, any individuals that we were unable to make contact with, we would start again and go back and make attempts to make contacts with those individuals. This process would have continued several times until a determination was made that the individuals were unreachable.

Q WHY WAS COMMUNICATION VIA EMAIL NOT AN OPTION?

In my recollection, we wanted to deliver the information, but not via email. We preferred to have a conversation with the individuals, advising them of our process. My recollection was, as a company, we felt it more suitable to call someone in the beginning and advise them of being made redundant than for them to get an email.

Q WHAT ABOUT THE APPROACH OF JUST CALLING THEM TO COME IN?

That decision was not made by my unit. As one would recall, this process impacted employees from numerous divisions, so the protocol we took on should have mirrored what was taken on in other divisions of the company.

Q ARE YOU AWARE OF OTHER CONTACTS THAT COULD HAVE REACHED HER?

I am not aware of her association, as a group of individuals that was responsible for contacting employees and so whether any employee had relatives or friends or family working here – a manager would be better to know of an individual with whom we could have made contact through.

Arising from the questions asked by the Tribunal, the witness further advanced thusly:

The process was this, – and this is what we undertook, in the case where we made contact with an individual - once the conversation would have been completed, we would have confirmed their email address and then forwarded a document similar to the one on page 9 of the Bundle of Documents.

The witness continued:

In my recollection, in the case where we were unable to contact an employee, the letter would not have been sent however, at a designated date, the funds would have been deposited into their account.

THE ISSUES AT HAND

The Applicant submits thusly:

14. On November 25th 2020, the Respondent unfairly and wrongfully terminated the contract of employment of the Applicant without proper notice or informing her of what led to the termination.

15. The Applicant's claim against the Respondent is for damages for wrongful and/or unfair dismissal, insufficient statutory notice pay, termination pay in accordance with reasonable notice, pay for the periods of furlough (layoff without pay periods), Pension, health and Welfare and NIB payments for the notice period and for interest on such damages pursuant to section 59(2) of the Industrial Relations Act 1992 from the wrongful/unfair breach at the date of termination until the date of payment…

Ultimately, the Applicant claims that her separation from employment was wrongful due to insufficient notice or payment in lieu thereof, and unfair due to the failure to follow the procedure for redundancy as required by section 26A of the Employment (Amendment) Act 2017, and Sections 34, 35 and 37 of the Employment Act.

Section 26A of the Employment (Amendment) Act 2017 provides:

26A Obligation of Employer contemplating Redundancy

(1) Where it is contemplated by an employer that twenty or more employees are to be dismissed because of redundancy, prior to dismissing those employees, the employer shall-

(a) Inform the trade union recognised in accordance with Part III of the Industrial Relations Act (Ch. 321) …

(b) Not later than one week prior to any employee being dismissed, consult with the recognised trade union …

(c) Consult with the Minister in writing no less than two weeks of the contemplation…

In this regard, the Tribunal notes at Tab 4 of the Respondent's Bundle, at page 13, a letter dated 15th November 2021 addressed to President of the Bahamas Hotel Catering and Allied Worker's Union, Mr. Darrin Woods, and at page 14, a letter addressed to the Minister of Labour & Immigration, the Honourable Mr. Keith Bell. Both letters advise that effective 28th November 2021, one hundred and seventy Bargaining Unit employees were to be released, in accordance with the specific provisions of the Act.

There is further noted at page 15, another letter addressed to the President of the Union, Mr. Woods, dated 22nd November, 2021, wherein the names, departments and positions of the impacted employees are listed. While the other names are redacted, the Applicant's name, department and position is duly identified at page 16 of the letter. There is the further notation:

> ***As discussed**, commencing tomorrow, we will contact each of our team members to advise of the redundancies. In this regard, **as we wish to honour our duty to speak with them first, we ask and would appreciate that you keep the list confidential** and would not disseminate and/or release the information to the third party. (my emphasis).*

Notwithstanding the intent, there is no dispute whatsoever, that the Applicant was not notified, as was envisioned. Of course, it is only just and right for an employee to be advised of terms that impact their employ. I am reminded of the case *Phiora Clarke v Hotel Corporation of The Bahamas*, where President of the Tribunal, the Honourable Mr. Malcolm Adderley, as he then was, *inter alia* stated:

> *Either you dismiss an employee by bringing such dismissal to that Employee's notice on a specified date or you maintain the status of Employer/Employee relationship….*

The Applicant further submits that Section 4 of the Employment Act provides for the common law relating to wrongful dismissal that allows claim for wages and benefits. In this regard, I am also referred to the case –*Garvey v Cable Beach Resorts Limited (dba Sheraton Nassau Beach Resort) [2014] 3 BHS J No. 36*, wherein Evans J, as he then was, referred to the decision of Lyons J in *Wells v Snack Food Wholesale [2006] 1 BHS J. No. 59*, paragraphs 28 and 29, wherein he considered the interpretation of Section 4 of the Employment Act thusly:

> *29. It is only if the contract between the employer and the employee made specifically for a greater provision on severance or if some other law (not the general common law) arrangement or custom similarly made for greater provision that section 4 could be called upon.*
>
> *30. The long and the short of it is that an employer on terminating an employee (other than for justifiable summary dismissal or unfairly) pays the employee's severance pay calculated in accordance with section 29, then the contract has been properly and fairly terminated and the employee has no cause for complainants. The employer has complied with the law.*

The gist of what I understand this ruling to say, is that, where Notice is provided in accordance with the Act, the employee would have no cause of action, where there has been compliance with and satisfaction of due payment in accordance with Section 26B. In this regard, even if the requirement to inform the employee directly was

breached, she would be entitled to the measure of damages already imputed to her, through the redundancy payment. To refer to the parlance utilized by Counsel to the Respondent:

> *It is not a question as to whether someone called someone but whether she received pay in lieu of notice. The only thing we can do is look at what she was paid.*

In this regard, Section 26B provides thusly:

> ***26B. Right to Redundancy Payment***
>
> *(1) Where an employee who has been continuously employed for one year or more is dismissed by his employer because of redundancy, his employer is, subject to the provisions of this Part, liable to pay to him a sum (in this Act referred to as a "redundancy payment" or "redundancy pay") calculated in accordance with subsection (2).*
>
> *(2) Subject to subsection (3), the amount of the redundancy payment shall be calculated by reference to the date of the employee's redundancy by starting on that date reckoning backwards the number of complete years of employment and allowing –*
>
> *(a) Where the employee has been employed for twelve months or more –*
>
> *(i) Two weeks' notice or two weeks' basic pay in lieu of notice; and*
>
> *(ii) Two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twenty-four weeks;*
>
> *(b) […]*
>
> *(3) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1)."*

To found a case of wrongful dismissal, the Applicant must demonstrate that the Respondent terminated her contract of employment without notice or pay in lieu of notice, and secondly that the Respondent was not justified in doing so. Based on the matters raised herein, I am ultimately satisfied that the proper notice and severance pay was applied in accordance with Section 26B of the Employment (Amendment) Act 2017 and that on a balance of probabilities, the necessary notifications to the Minister and to the requisite Union were applied in accordance with the specific requirements of Section 26A. In this regard, I do not find that the Applicant was wrongfully dismissed.

The Applicant has also claimed Unfair Dismissal contrary to Section 34 of the Employment Act, which provides that every employee shall have the right not to be unfairly dismissed, as provided in sections 35 – 40 by his employer. Section 35 provides:

> *Subject to Section 36 – 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined* ***in accordance with the substantial merits of the case****.*

The Applicant submits that Section 37 of the Employment Act was contravened, giving way to unfair dismissal, due to there being no selection process between the Union and the Respondent. Section 37 provides thusly:

> *37. Where the reason or principal reason for the dismissal of an employee was redundancy but it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer and either-*
>
> > *(a) that the reason (or, if more than one, the principal reason) for which he was selected for dismissal was an inadmissible reason; or*
> >
> > *(b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case, then for the purposes of this Part the dismissal shall be regarded as unfair.*

The Applicant goes further to state that there was no selection process based on any customary arrangement between the Union and the Respondent and refers to Sections 31 and 32 of the Third Schedule (section 4) Code of Industrial Practice found in the Industrial Relations Act which provide thusly: :

> *"31. A policy for dealing with reductions in the work force, if they become necessary, should be worked out in advance so far as practicable and should form part of the undertaking's employment policies. As far as is consistent with operational efficiency and the success of the undertaking, management should, in consultation with the trade unions concerned, seek to avoid redundancies by such means as —*

(a) restrictions on recruitment;

(b) retirement of employees who are beyond the normal retiring age;

(c) reductions in overtime;

(d) short-time working to cover temporary fluctuations in manpower needs; or

(e) re-training or transfer to other work.

32. If redundancy becomes necessary, management in consultation as appropriate, with the appropriate Ministry and with the employees or their trade unions, should —

(a) give as much warning as practicable to the employees concerned and to the Ministry;

(b) consider introducing schemes for voluntary redundancy, retirement, transfer to other establishments within the undertaking, and a phased rundown of employment;

(c) establish which employees are to be made redundant and the order of discharge;

(d) offer to help employees in finding other work, in cooperation with the Ministry; and

(e) decide how and when to make the facts public, ensuring that no announcement is made before the Ministry, employees and their trade unions have been informed.

On the testimony presented, however, the Applicant has led no cogent evidence to demonstrate how she may have been unfairly selected for redundancy, in the absence of there being any indication of 'seniority' on the floor. Moreover, if the presumed tradition of 'last in' 'first out', existed, she has led no evidence of the same, sufficient to suggest that the Respondent failed to have regard to her 'seniority' over the other cocktail waitresses. As per the evidence of the Respondent's witness however, there is no such escalation of rank within the category of employment, and the Applicant's tenure, apparently, was not a determining factor. Moreover, I am reminded of the communication sent to the Union which specified the particular Applicant by her name, department and position, and made reference to a previous 'discussion' having been held. In the absence of more, and on the

balance of probabilities, having regard to the substantial merits of the case, I have no basis upon which to determine, the redundancy of the position held by the Applicant was not in fact agreed between the Union and the Respondent. If it were otherwise the case, it is more likely than not, that one would have most certainly have heard about it in the press, as is common place.

The Applicant raises another case, that of *Kayla Ward et al v the Gaming Board of The Bahamas 217/CLE/gen/01506* . In my view, this case is readily distinguished from the instant matter, because in the *Kayla Ward et al* case, the Court noted that there was no indication of any procedure of how the Applicant or others were chosen and no evidence of any consultation with either the Union as bargaining agent nor was their proper notice to the Minister of Labour. Such defects however, do not exist in this case, where there appeared to have been, at the very least, a 'discussion' followed by formal documented communication, and if the Applicant wanted to prove otherwise, it was open for them to produce corroborating evidence, by calling the President of the Union to attest to the assertions made otherwise.

The Applicant also makes reference to the case *Bahamas Hotel Management Association and Lucayan Renewal Holdings Limited 2020/CLE/gen/00096* advancing the dicta of Hanna-Adderley J at paragraphs 112-119 wherein she considered thusly:

> *"118. Halsbury's Laws of England, Volume 39 under the chapter dealing with employment at paragraph 28, under the rubric "Payment of wages during lay-off or short time" provides: "Whether an employer has a right to lay off an employee or shorten his hours, and, if so, on what terms, will often be governed, in a trade where it is particularly relevant, by a collective agreement or by express terms in the contracts of employment of the employees affected. As in the case of the payment of wages during sickness, there are no general rules of law and the matter depends ultimately on the terms of the contract. If there is no express term, an employer may seek to establish an implied term permitting lay-off or short-time working; and, in reaching its decision, a court may, in particular, look at custom and practice in the trade at previous dealings and at the nature of the work in question. If, however, there is no term, express or implied, allowing the employer to lay off or shorten hours, then, as long as the employee remains ready and willing to work the normal hours, he may bring a claim for his normal wages, since*

there is no inherent power at common law for an employer to suspend an employee without pay".

119. Mr. Ferguson drew the Court's attention to page 142 of Labour Law in The Bahamas by the late Osadebay, JA which I agree outlines the position in The Bahamas in connection with lay off. There has been no evidence adduced before the Court that the contract of employment contained a term relating to lay off without pay nor has there been evidence that the same is a custom in the industry. But I do not agree with Mr. Ferguson's assertion that the 1st Defendant terminated the 16th Plaintiff in March 2020. The 16th Plaintiff's pleaded case is that the failure to pay him wages during the lay off period is a fundamental breach of his employment contract. I disagree as I find that although the failure to pay wages during the layoff was a breach of contract it was not a fundamental breach that went to the root of the contract of employment. Therefore, I accept that Section 28B of the Amended Act treats the period of lay-off as the continuous employment of that employee and as such the 16th Plaintiff's wages for the period of layoff to the termination exercise less any National Insurance Board of The Bahamas unemployment benefits for that period should be paid to the 16th Plaintiff.

Sadly however, even if the Tribunal were persuaded to adopt this approach, the Applicant has led no evidence whereupon the Tribunal may determine what sums are to be due to her, from the period of lay off to the cessation of employment, less any NIB unemployment benefit paid to her for this period. The evidence is that she was on lay off from March 19th 2020 and during this time, up to when she received a redundancy payment, she had received unemployment benefit. There has been led no evidence at all of what this sum actually was. At paragraph 13 of her witness statement, she averred she earned a base salary of $196.88 per week. There has been advanced no differential, if any, for the Tribunal to make any calculation based thereupon. The paucity of evidence led in this light does not permit the Tribunal to make a ruling based on fact, as opposed to supposition. Given the extent of Emergency Orders issued by the Bahamas Government which resulted in the mandatory shutdown of our borders and the local business community at large, and the slow resumption of commercial activity, it is highly unlikely that, (notwithstanding the limited continuation of employment during the period of the Emergency Orders or thereafter), the Applicant could have expected to receive her customary take home pay, including tips, given the availability of work opportunity. Indeed, there are many that would say that they 'earned'

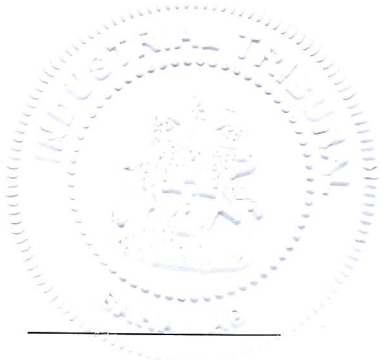
more by way of unemployment benefit offered during these periods of lay off, than they would have earned working reduced days, or otherwise.

Ultimately, it is most unfortunate that the Applicant was not afforded the direct opportunity of communication as regards the cessation of her employment, as perhaps she may have been successful in persuading her employer concerning her bid for retirement or some other viable alternative. Suffice it to say, and certainly as a matter of good industrial relations, every effort should be made by an employer, to exhaust every available avenue to reach out in direct communication with its employees, to advise them personally of matters that impact his employment – whether that initial contact is originated by phone, email, social media platforms, family, friend, association or other connections, etc. Having said this, the measure of damages to which the Applicant would be entitled under Section 26A is akin to that which she would have already received, and, as it stands however, the Tribunal is bound by the decision of the Court of Appeal as expressed in the *Garvey* matter.

Accordingly, this Application is herewith dismissed.

AND THIS IS THE JUDGEMENT OF THE TRIBUNAL

Dated 1st September 2023



Rionda Godet
Vice President
Industrial Tribunal