EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2014/083

EMERSON BASCOMBE **CLAIMANT**

AND

BARBADOS WORKERS UNION

COOPERATIVE CREDIT UNION LIMITED **RESPONDENT**

DATES: September 18, 2017; September 19, 2017; October 19, 2017; February 12, 2018; February 13, 2018; and April 24, 2018

BEFORE: Mr. Omari Drakes, Mr. John Williams, Mr Ulric Sealy

APPEARANCES: Sir Roy Trotman for the Claimant

Dr Hensley Sobers for the Respondent

INTRODUCTION

[1] This is a claim of unfair dismissal made pursuant to Section 32 (1) of the **Employment Rights Act – 2012 (the "Employment Rights Act")** by Emerson Bascombe (the "Claimant") against his former employer the Barbados Workers Union Cooperative Credit Union Limited (the "Respondent") following the Claimant's dismissal on December 31, 2013.

FACTUAL BACKGROUND

[2] The Respondent is in the business of providing credit union services and products.

[3] The Claimant was hired by the Respondent as a Senior Loans Clerk on February 5, 2004. By way of letter dated July 12, 2007 the Claimant was offered the position of Loans Supervisor with effect from November 1, 2006.

[4] The Claimant in his evidence made reference to certain acts by the Respondent that he believed were aimed at frustrating, embarrassing and undermining his authority. Claimant's employment with the Respondent came to an end on December 31, 2013.

It was the Claimant's view that his dismissal was personal, malicious and contrived. During his testimony the Claimant appeared to be genuinely hurt by the actions taken by the Respondent; particularly so in light of his medical condition of which the Respondent was aware.

[5] The Respondent's General Manager Ms Corrine Clarke testified on behalf of the Respondent. She indicated that the Respondent was subject to a review by the Financial Services Commission ("FSC") who indicated that there was a need to implement a corporate governance program to address risks that the Respondent was exposed to in the financial services sector. Ms Clarke further testified that given this mandate, the Respondent sought to reduce the said risk by establishing the post of Credit Risk Manager. It was believed that the new post would "subsume and incorporate the former position of Loans Supervisor". In cross-examination, the Claimant testified that he only became aware of the FSC review in December 2013 and was not aware that the FSC was emphasising risk management.

[6] Ms Clarke's testimony was corroborated by extracts from the minutes of Board Meetings of the Respondent held on November 25, 2013, December 12, 2013 and December 27, 2013. The Tribunal sees no reason to disbelieve Ms Clarke or the evidence of the mandate from the FSC.

[7] By letter dated December 31, 2013, the Respondent wrote to the Claimant advising him that

> *…effective December 31st 2013, your position as Loans Supervisor within the organizational structure will be made redundant.*

[8] The letter also indicated that the Claimant's severance payment on termination would be the sum of Thirty Thousand Four Hundred and Sixty-Four Dollars and Fifty-Five Cents (BDS $30,464.55) representing a severance payment and pay in lieu of one month's notice. The Claimant was also to receive accrued vacation pay plus a gratuitous payment of a training grant equivalent to one month's salary.

[9] The Claimant being dissatisfied with the circumstances of his dismissal claimed unfair dismissal against the Respondent.

ISSUES

[10] The issues to be determined in this case are:

(i) Has the Claimant satisfied section 27 of the Employment Rights Act;

(ii) Did the Respondent satisfy its obligation under Section 29;

(iii) What was the principal reason for dismissal; and

(iv) Did the Respondent satisfy its obligation under to Section 31?

DISCUSSION

Has the Claimant satisfied section 27 of the Employment Rights Act?

[11] Section 27 of the **Employment Rights Act** states that:

> *(1) An employee has the right not to be unfairly dismissed by his employer.*
>
> *(2) Subsection (1) has effect subject to the following provisions of this Part.*
>
> *(3) Subsection (1) does not apply to the dismissal of the employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.*

[12] To the extent that the Claimant was first employed by the Respondent on February 5, 2004 and dismissed by the Respondent on December 31, 2013, there is no doubt that the Claimant was continuously employed for the requisite period of one year. In the circumstances the Tribunal finds that the Claimant has met the necessary requirements not to be unfairly dismissed pursuant to Section 27 of the **Employment Rights Act**.

Did the Respondent satisfy its obligation under to Section 29?

[13] Having met the requirements of Section 27 of the **Employment Rights Act**, the burden shifts to the employer to show that the dismissal was fair. Section 29 of the **Employment Rights Act** states that:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*
>
> *(a) the reason, or, if more than one, the principal reason, for the dismissal; and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) An employer shall have the right to dismiss an employee for a reason which falls within this subsection if it*
>
> *(a) relates to the capability of the employee to perform work of the kind which he was employed by the employer to do;*

(b) relates to the conduct of the employee;

(c) is that the employee was redundant, but subject to section 31; or

(d) is that the employee could not continue to work in the position which he held without contravention, either on his part or on that of his employer, of a duty or restriction imposed by law.

(3) …

(4) *Where the employer has fulfilled the requirements of subsection (1), the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether*

(a) *The employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*

(b) *The employer complied with the rules set out in Part A of the Fourth Schedule.*

[14] It therefore rests with the Tribunal to determine what was the primary reason for the Claimant's dismissal.

What was the principal reason for dismissal?

[15] The reason stated for the Claimant's dismissal in the termination letter dated December 31, 2013 was redundancy. The Tribunal must now consider if the Respondent can successfully show that this was in fact the reason or principal reason for dismissing the Claimant.

[16] Section 31 of the **Employment Rights Act** states that:

(1) A dismissal of an employee does not contravene the right conferred on him by section 27 where

(a) The reason for his dismissal is that he was redundant; and

(b) the requirements of subsections (4), (5) and (6) were complied with in relation to his dismissal for redundancy.

(2) An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that

(a) his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry our work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish.

(3) In subsection (2), "cease" means cease either permanently or temporarily and from whatever cause, and "diminish" has a corresponding meaning.

(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 recognised 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 employees, in addition to the employee in question, are affected by those facts.

(6) The consultations referred to in subsection (4) (a) are consultations with the affected employees or their representative,

being consultations conducted in accordance with the following requirements:

(a) The consultations 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 consultations 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

(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 such steps towards compliance with the requirement as are reasonably practicable in all the circumstances.

(7) …

[17] There is no evidence before the Tribunal that the Respondent ceased, or intended to cease, to carry on the business for the purposes of which he employed the Claimant at the time of his dismissal. Neither is there evidence that the Respondent ceased, or intended to cease, to carry on that business in the place where the Claimant was employed at the time of his dismissal. Therefore the Tribunal finds that economic state of affairs established by Section 31 (2) (a) of the **Employment Rights Act** do not apply. The Tribunal finds that Section 31 (2) (b) of the **Employment Rights Act** is more applicable to the existing facts**.**

[18] Section 31 (2) (b) of the **Employment Rights Act** is *in pari materia* with Section 81 (2) (b) of the English **Employment Protection (Consolidation) Act 1978**. Section

81 of **Employment Protection (Consolidation) Act 1978** was considered in the House of Lords case of **Murray and another v Foyle Meats Ltd [1999] 3 All ER 769.** In that case Lord Irvine stated at page 3 that:

> *My Lords, the language of paragraph (b) is in my view simplicity itself. It asks **two questions of fact**. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the Tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter ("the **Murray** test").*

[19] Murray was later cited with approval in the local case of **June Clarke v American Life Insurance Company Civil Appeal No. 33 of 1998**.

[20] In light of the provisions of the Act, together with the cases of **Murray** and **June Clarke**, the Tribunal is of the view that there are two questions that it must consider:

i. Whether the requirements of the Respondent's business for an employee to supervise loans ceased or diminished or were expected to cease or diminish at the time of the Claimant's dismissal; and

ii. Whether the Claimant's dismissal was attributed wholly or mainly to that cessation or diminution.

[21] It has been established through the common law that "the **Murray** test" for redundancy can be satisfied where a reorganization of a company results in the absorption of work by fellow employees. Indeed, in **The Law of Redundancy**[1] the author states that absorption of work by fellow employees:

> *…is the most straightforward example of the second main category of redundancy situations.*

[22] In contrast, the Claimant argues that redundancy was not the principal reason for his dismissal. Indeed, his evidence does show that there were some feelings of ill will between him and other senior staff of the Respondent in 2013. However, the

[1] Grunfeld, Cyril. The Law of Redundancy. London: Sweet & Maxwell, 1989. Print.

evidence also shows that there was a mandate from the FSC to implement a corporate governance program to address risks that the Respondent was exposed to in the financial services sector. As a result of the mandate, the Respondent embarked on a process of reorganising its business structure. Due to the reorganisation of the Respondent's business structure, it was expected that the position of Credit Risk Manager would subsume and incorporate the Claimant's position of Loans Supervisor. To put it another way, after the reorgainsation the Respondent would have had two "Loans Supervisors", but it only required one. This is a classic case of redundancy.

[23] Therefore, while the Tribunal accepts that there were some feelings of ill will between the Claimant and other senior staff of the Respondent in 2013, it finds that the reason for dismissing the Claimant was mainly due to the fact that the requirements of the Respondent for the Claimant to carry out the work of a Loans Supervisor was expected to diminish. Consequently, the Tribunal finds that redundancy was the principal reason for the Claimant's dismissal.

[24] Given the prevailing circumstances, that is, the influence by the FSC to implement a corporate governance program to address risks that the Respondent was exposed to in the financial services sector, the Tribunal further finds that pursuant to Section 29 (4) (a) of the **Employment Rights Act** the Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant.

[25] We pause here to mention that to the extent that the dismissal is not due to a disciplinary reason, Section 29 (4) (b) of the **Employment Rights Act** does not apply**.**

Did the Respondent satisfy its obligation under to Section 31?

[26] Having found that the principal reason for dismissing the Claimant was redundancy, the Tribunal must determine if the dismissal satisfies Sections 31 (4), (5) and (6) of the **Employment Rights Act.**

[27] Section 31 (4) of the **Employment Rights Act** is triggered 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.

[28] No evidence was put before the Tribunal that the workforce of the Respondent would have been reduced by 10 per cent at the time of the dismissal. However, the Claimant submits that the Respondent was still duty bound to consult with him and/or his union prior to dismissing him. His argument in this regard was two pronged.

[29] The first prong was grounded in common law authorities. The theme of the authorities relied upon by the Claimant is that in dismissing an employee as a result of redundancy, there remains an obligation to act reasonably when carrying out the

dismissal. Reasonableness in these cases being, consultations with the employee and/or his union.

[30] The Tribunal notes that the cases relied upon by the Claimant were grounded on the **Employment Protection Act 1975** and **Employment Protection (Consolidation) Act 1978**. It is therefore necessary to consider the obligations placed on an employee under these Acts.

[31] Section 99 (1) of the **Employment Protection Act 1975** states that:

> *An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of that trade union about the dismissal in accordance with the following provisions of this section.*

[32] Therefore an obligation to consult an employee's trade union is statutorily required by the **Employment Protection Act 1975.**

[33] Pursuant to Section 59 of the **Employment Protection (Consolidation) Act 1978**

> *Where the reason or principal reason for the dismissal of an employee was that he was redundant, 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.*

[34] Section 99 (1) of the **Employment Protection Act 1975 and** Section 59 of the **Employment Protection (Consolidation) Act 1978** contain obligations not incorporated into the **Employment Rights Act.**

[35] Having reviewed the cases submitted together with the relevant legislative influencers, the Tribunal finds that the decisions in the cases relied on by the Claimant were grounded on legislative obligations not applicable in Barbados. These

cases are therefore distinguishable and in this regard, the Tribunal does not find these cases to be persuasive.

[36] The second prong used by the Claimant was more novel. The Claimant submitted that to the extent that the position of Loans Supervisor is a senior position at the Respondent, a dismissal of the Loans Supervisor would represent a "significant number" under the **Employment Rights Act.** That being the case, the Respondent was obliged to conduct consultations with the Claimant and/or his trade union prior to dismissing him.

[37] The Tribunal's finds that Sections 31 (4), (5) and (6) of the **Employment Rights Act** are concerned with the quantity and not the quality of employees being dismissed. There is nothing in these subsections on which the Tribunal can uphold an argument that "significant number" could be invoked when it is a senior employee dismissed. The Tribunal was therefore not persuaded by this argument.

[38] Based on the above findings, the Tribunal further finds that Section 31 (4) of the **Employment Rights Act** has no application in this case and that the Respondent had no statutory obligation to consult with the Claimant prior to dismissing him.

Reorganisation as "some other substantial reason"

[39] Notwithstanding the above findings, the possibility of reorganisation amounting to "some other substantial reason" for dismissing the Claimant was also of interest to the Tribunal.

[40] Section 29 (1) (b) of the **Employment Rights Act** provides a potentially fair reason for dismissal, that being "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

[41] Legal authorities show that in cases where there is a restructure that does not give rise to a redundancy situation, redundancy cannot be relied on as the potentially fair reason for dismissal, but some other substantial reason ("SOSR") can be.

[42] An analysis of the facts of this case and the relevant authorities suggest that the Respondent might have been entitled to argue that the Claimant was dismissed for SOSR.

[43] However, in the absence of full submissions on this point, the Tribunal could make no definite conclusion on the merits of a SOSR argument and therefore did not do so.

DISPOSITION

[44] In light of the discussion above, the Tribunal unanimously finds that the principal reason for the Claimant's dismissal was redundancy. The Tribunal further finds that Sections 31 (4), (5) and (6) of the **Employment Rights Act** have no application to this case and as such there was no obligation placed on the Respondent to consult

with the Claimant or his union. In light of these findings the Claimant's claim of unfair dismissal is dismissed.

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Mr. Omari Drakes

…… ……
Mr. John Williams Mr. Ulric Sealy