**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 23 of 2021**

**BETWEEN:**

**BARBADOS AGRICULTURAL MANAGEMENT CO. LTD** **Appellant**

**AND**

**ORVILLE WICKHAM** **Respondent**

**Before: The Hon. Chief Justice, Sir Patterson Cheltenham, K.A., The Hon. Rajendra Narine and The Hon. Jefferson Cumberbatch, Justices of Appeal**

**2022: November 2, December 02**
**2023: March 17**

**Mr. Michael Koeiman of Dentons Delaney Attorney-at-Law for the Appellant**

**Ms. Honor Chase, Attorney-at-Law for the Respondent**

**DECISION**

**CUMBERBATCH JA:**

**(A) Introduction**

[1] We are tasked here with assessing the merits of an appeal against a unanimous decision of the **Employment Rights Tribunal** (the **Tribunal**) that the Appellant employer had unfairly dismissed the Respondent employee for redundancy, owing to its failure to comply with the mandatory

consultative process expressed in **section 31** of the **Employment Rights Act 2012 [The ERA]**.

**(B) Background**

[2] The Appellant is a state-owned enterprise charged with the management of Barbados's national agricultural function. The Respondent was, up to the time of his dismissal, the Agricultural Manager and Head of Department in the Agricultural Department of the Appellant.

[3] It was a time of austerity and fiscal adjustment in Barbados. The governing administration reduced its annual subvention to the Appellant by BDS$ 12M and both the Ministry of the Civil Service and the Ministry of Agriculture and Food Security instructed the Appellant to "achieve greater efficiencies in its operations by way of restructuring". In consequence, the Appellant decided to reduce its staff complement by means of redundancy.

[4] Subsequently, by a letter dated 27 December 2017, the Appellant terminated the Respondent's employment, advancing as the reason the above- cited dual ministerial directive.

[5] Accordingly, the Respondent filed an action for unfair dismissal against the Appellant before the **Employment Rights Tribunal**.

[6] The Respondent asserted that he was not a member of a union, nor had he been consulted with by the Appellant as an "affected employee" under **section 31** of the **Act**.

[7] He however acknowledged that he had attended a Heads of Department meeting on 18 October 2015 at which he was requested to provide the Human Resources department of the Appellant with a full list of the positions and number of employees to be laid off, a request with which he, as Head, duly complied.

[8] He further insisted in his evidence that at no time during his attendance at meetings with management of the Appellant was he ever informed that he too might be dismissed, or his post made redundant.

[9] Moreover, he swore that he had never been invited to the December 2015 meetings with the Sugar Industry Staff Association (SISA), the recognized union representing supervisory staff of the Appellant in the category of the Respondent. This claim was corroborated by Mr. Leslie Parris, the General Manager of the Appellant, under cross-examination before the **Tribunal**.

**(C) Statutory Context**

[10] The **ERA** expressly provides that a dismissal for a genuine redundancy, as defined in **section 31 (2)**, does not constitute an unfair dismissal. But this is potentially so only. According to **section 31(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."

[11] The **subsections** referred to in **(b)** above need to be set out *in extenso* for ease of reference:

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

**(D) In the Tribunal**

[12] The **Tribunal** in its written judgment of 2 September 2021 immediately and rightly identified the issue for its determination as "whether there was compliance by the Respondent with **section 31** of the **Employment Rights Act** …when the Claimant was made redundant in December 2018."

[13] After a recital of the factual background and the evidence in the matter, the **Tribunal** turned to an analysis of the law.

[14] This commenced, as a result of a submission by the then Respondent's representative that the matter was to be guided by the provision in a UK statute, with the caveat voiced by *Anderson J CCJ* in **Chefette Restaurants Ltd. v Orlando Harris (2020) CCJ 6 [AJ]** at paragraph 45, where he cautioned against the use of concepts from other jurisdictions in interpreting the provisions in the **ERA**.

[15] The **Tribunal** put it thus:-

> "Whereas the issues in **Chefette** focused on conduct, the Tribunal is of the view that the …statement is applicable to the entirety of the ERA, and in the context of the present 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."

[16] After a citation of **section 31 (4) to (6)**, of the **ERA** the **Tribunal** gave short shrift to the contention of the Appellant employer that since the Respondent had been 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 indeed been consulted about the redundancy.

[17] The **Tribunal** found no merit in that argument. First, the Appellant's General Manager had conceded that no discussions had been held with the Respondent on the list he had submitted. Second, a discussion with the Respondent as Head of Department was not the consultation required by **section 31 (4)** and **(6)** where the employee is not a member of a union.

[18] Given these findings, the **Tribunal** concluded at paragraph 15 of the written decision that the purported dismissal of the Respondent by reason of redundancy was unfair.

**(E) This appeal**

[19] Learned counsel for the Appellant filed three grounds of appeal with a reservation to add further grounds after examination of the transcript from

the proceedings in the **Tribunal**. The grounds were that the **Tribunal** erred in law in:

i. Holding that the Appellant failed to comply with section 31 of the Employment Rights Act by reason only that the Appellant consulted with a trade union recognized to represent employees of a class to which the Respondent belonged though the Respondent was not a member of that union

ii. Holding that the Appellant failed to comply with section 31 of the Employment Rights Act by reason only that the Appellant consulted with the Appellant (sic) in his capacity as a head of department rather than "in his personal capacity".

iii That the Tribunal unreasonably failed to take into account evidence which showed that the Appellant had complied with section 31 of the Employment Rights Act so as to make the Respondent's dismissal fair, namely that:

(a) the Respondent had warning of the potential for redundancy shortly after the Appellant had seriously considered it:

(b) the Respondent had intimate knowledge of the financial circumstances of the Appellant and the resulting need drastically to reduce staff as he was tasked as Head of Department with identifying staff to be made redundant.

(c) the Appellant engaged in consultation with the union recognized to represent managers such as the Respondent; and

(d) that (sic) the Appellant identified a reasonable selection criterion ("last in, first out") and notified this to the union who had the opportunity to consider it and respond; and

(e) the Appellant gave timely notice to the Labour Department of its intention to embark on the redundancy exercise, advising of its selection criteria and identifying the affected employees, including the Respondent; such that the decision of the **Tribunal** was perverse.

**(F) Submissions**

**(i) The Appellant**

[20] Learned counsel for the Appellant, Mr. Koeiman, premised his submissions from his view of the twin findings of the **Tribunal** of the Appellant's failure to comply with **section 31** of the **ERA**. These were:

i. The Appellant consulted with SISA on behalf of the Respondent in circumstances where the Respondent was not a member of SISA; and

ii. The Appellant consulted with the Respondent in his capacity as head of Department which is not the consultation required by section 31 (4) and (6) where the employee is not a member of a union.

[21] Counsel maintained that in so ruling, the **Tribunal** expressly refused to consider decisions from the United Kingdom based upon *section 188 (1B)* of the *Trade Union and Labour Relations (Consolidation) Act 1992* of the

*United Kingdom (TULRA)*, by finding that that section did not have "any application in the instant matter".

[22] He conceded that where an employee is a member of a union, the employer may consult with the union on that employee's behalf. Thus, he argued, the only question to be decided by us was "whether, as a matter of law, an employer can consult, on behalf of an employee (sic) with a union of which the employee is not a member".

[23] In this regard, he contended that nothing in **section 31** indicated that the employee in question must be a member of the trade union, "recognized for the purpose of bargaining on behalf of the employee"

[24] Nor, he insisted, was such a requirement imported into **section 31** by necessary implication, since there was no logical reason why a trade union recognized by the employer as representing a class of employees could not be consulted on behalf of an employee who is a member of the class but not a member of the trade union.

[25] Counsel cited in support of his argument *section 188 (1B) of TULRA* that he asserted was *in pari materia* with **section 31**of the **ERA**. This section provides as follows:

> "For the purposes of this section, the appropriate representatives of any affected employees are:

> (a) if the employees are of a description in respect of which an independent trade union is recognized by their employer, representatives of the trade union, or
>
> (b) in any other case, whichever of the following employee representatives the employer chooses:
>
> (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected)have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;
>
> (ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 188A(1)."

[26] Learned counsel further reiterated on this basis that the **Tribunal** erred in law in refusing to consider decisions interpreting that section as persuasive in the same manner that recourse is regularly had to consideration of the *Employment Rights Act 1996* of the *United Kingdom* where its provisions are *in pari materia* with the **ERA**.

[27] Mr. Koeiman also referred us to the Northern Ireland case of **Governing Body of the Northern Ireland Hotel and Catering College & North**

**Eastern Education and Library Board v National Association of Teachers in Further and Higher Education [1995] IRLR 83** where, in interpreting *section 49 (1)* of the *Industrial Relations (Northern Ireland)* Order, the court held that when an independent trade union is recognized by the employer, "the employer's obligation to consult a trade union relates to an employee of a description or category in respect of which the union is recognized, whether or not that employee is a member of that particular union."

[28] Insofar as consultation with the Respondent himself was concerned, counsel argued that no authority had been cited by the **Tribunal** in support of the distinction it had attempted to draw between consulting an employee in his individual capacity and consulting him as head of department. He further posited that no such distinction arose by necessary or logical implication from the **Act** and that to draw this distinction was a clear error of law that he urged us to opine on expressly.

**(ii) The Respondent**

[29] Learned counsel for the Respondent, Ms. Chase contended, in her written submissions, that for the Appellant to succeed, we must:

(i) find favour with its counsel's interpretation of section 31 (4) of the ERA; and

(ii) find, as a matter of fact, that the Respondent was a member of the class of employees who were recognized (sic) as being represented by SISA.

[30] As regards the interpretation of **section 31 (4)**, she noted that while the provision in *section 188(1B) TULRA 1992* leaves no doubt as to whom employers are permitted to consult in cases of redundancy, counsel for the Appellant had pointed to no similar provision in the **ERA** nor any other local statute. In any event, she noted, this absence creates the distinction between the UK and Barbados positions.

[31] The words of **section 31 (4)** of the **ERA**, she observed, are "precise and unambiguous". In her view, the section mandates the employer to the trade union recognized for the purpose of bargaining on behalf of that specific employee and not with the trade union recognized for the purpose of bargaining on behalf of an employee of a particular class or description, as contended by counsel for the Appellant.

[32] She also propounded that the Northern Ireland decision relied on by opposing counsel was of little assistance to the Appellant since the provision considered there was "almost identical" to that in *TULRA* referred to above.

[33] She concluded that had it been the intention of the Barbados Parliament to copy the UK provision, it would have made it clear by including the definition mentioned above for the avoidance of doubt.

[34] In any event, she insisted, the Appellant had failed to establish that the Respondent was a member of a class of employees who were recognized as being represented by SISA and, contrary to the assertion of the Appellant, it was not a finding of fact by the **Tribunal** that SISA was the union recognized to represent managers of the Appellant. She further remarked that at the **Tribunal** hearing the Appellant did not put to the Respondent that he was a manager nor was any evidence adduced in support of such contention.

[35] She submitted therefore that in the absence of such proof and/or (sic) finding of fact, the Appellant cannot validly contend that the **Tribunal** was in error in holding that the Appellant failed to comply with **section 31**. The Appellant simply did not adduce any evidence on this point for the **Tribunal** to consider and make a determination, she insisted.

[36] With respect to the individual consultation with the Respondent, counsel maintained that it had always been the Respondent's case that the Appellant did not hold any consultations with him as Head of Department to the extent alleged by the Appellant and none at all with him as an affected employee.

[37] Additionally, she argued that there was no denial by the Appellant that once it had obtained the requested list of employees to be retained from his department, no further meeting was held with the Respondent as follow-up

or finalization and that the Appellant had admitted that the Respondent was not present at any of the meetings that had been held with SISA on 5, 12, and 19 December 2015.

[38] In the circumstances, she urged us to affirm the decision of the **Tribunal.**

**(G) The issue**

[39] Given the written and oral submissions of respective counsel, we determine that the central issue that arises for our immediate resolution is:

> **"Whether the nature of the consultations that the Appellant claims to have carried out suffices to effect compliance with section 31 (4) and (6) of the ERA."**

**(H) Discussion**

[40] As counsel for the Appellant contended, correctly in our view, under **section 31** of the **Act**, the employer is permitted the option to consult directly with the employee **or** with his representative **(subsection (6))**, namely, the trade union recognized for the purpose of bargaining on behalf of that employee - **(subsection 4(b))**.

[41] The Appellant admits that it consulted with the Respondent in his capacity as Head of the Agricultural Department although not as an employee in his "individual" capacity. While it is true that the **Tribunal** in its written decision cited no authority for its holding that this was not the type of consultation required by the **section**, we consider that this was the only opinion it could have reasonably come to in the circumstances.

[42] In our view, the right not to be unfairly dismissed or, otherwise express, not to have one's contract of employment terminated unfairly, is a personal and individual employment right under **section 27** of the **ERA**.

[43] In consequence, the right to be consulted on the matters such as those stipulated in **section 31 (6) (b) (iii)** so as to mitigate the unarguably harsh effects of the proposed dismissal is more fairly accorded to the individual employee than to the department head who might himself be intimately concerned in the effecting of the dismissals for redundancy.

[44] So far as consultation with the representative is concerned, the Appellant claimed that it consulted with SISA, the union that it argued was recognized for the purpose of bargaining on behalf of management staff such as the respondent.

[45] As was the **Tribunal,** we, too, are unable to gain much assistance from the TULRA section cited by counsel for the Appellant. For one, it is not a substantive section as is its **ERA** counterpart, but is, rather, a definition section for the substantive **section 188 (1) (A)**. This provides:

> "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by any of the measures taken in connection with these dismissals".

[46] Not only is this section patently different from **section 31 (4)**, but the TULRA section expressly cited, *section 188(1B)*, purports to define a concept, "*appropriate representatives*" that finds no place in local legislation.

[47] Counsel for the Appellant submitted an addendum to his submissions on 31 October 2022. There, he argued that in **Chefette**, *supra* the **CCJ** had accepted at paragraph 82 of its judgment that decisions of foreign courts may still be applied where those decisions are based on foreign statutes with wording not identical to the local statute. The question, he submitted, was the materiality of the difference. The relevant **CCJ** paragraph reads as follows:

> "The Court of Appeal was clearly correct to focus on the provisions of the ERA enacted by the Parliament of Barbados in contrast with the provisions in employment statutes enacted in other countries. It is axiomatic that legislation is to be interpreted in accordance with the accepted rules of statutory interpretation which require first and foremost that the court must seek to give effect to the sovereign intention of the legislature by reference to the words used in the legislation. Subsidiary assistance may be obtained from other sources such as foreign judicial decisions in *pari materia* with those under consideration, but care must be taken to consider any differences in wording or context of these provisions. As *Sir David Simmons CJ* said, in the case of **Wood v Caribbean Label Crafts Ltd. (unreported)** the task in approaching English decisions is to read them with a discerning eye and an analytical mind."

[48] From this premise, he contended that *section 188 (1B)* of *TULRA* and *article 49(1)* of the *Industrial Relations (Northern Ireland) Order* are *in pari materia* with **section 31 (4)** of the **ERA** since "both (sic) require an employer who has recognized a trade union for the purposes of bargaining on behalf of an employee to consult with that trade union before dismissing that employee on the ground of redundancy".

[49] We do not consider that anything in the passage cited above from the **CCJ** decision in **Chefette** detracts significantly from our sentiments stated earlier. Foremost, the language of the **ERA** is clear and unambiguous, needing no assistance from foreign jurisprudence for clarification. In other words, the provisions in **section 31 (4) (b)** and **(6)** require no exogenous gloss for us to ascertain their meaning.

[50] Further to admitting that the sections were not identical, counsel noted that the foreign provisions were narrower than **section 31 (4)** since they prescribed that the employee must be one of a "description" in relation to whom the employer has recognized the trade union while the **ERA** section did not expressly so restrict the employer in terms of which employees it may recognize the trade union as representing.

[51] He continued that it was nevertheless clear that in all three jurisdictions where an employer has so recognized a trade union, the employer must

consult with it and he finally posited that the reasoning applied in the UK and Northern Irish cases should apply *a fortiori* to the broader provisions of **section 31(4)** of the **ERA**. However, as we have noted above, we have no reservation as to the meaning of the subsections referenced.

[52] In oral argument before the Court, counsel for the Appellant firmly rejected the statement by counsel for the Respondent that no evidence had been led before the **Tribunal** that SISA had been recognized by the Appellant to bargain collectively on behalf of the Respondent. He drew our attention to page 170 of the **Tribunal** transcript where, in response to a question from Ms. Chase, the General Manager, Mr. Leslie Parris responded, "*Yeah, he was not consulted in that regard because we were also of the view that any position negotiated by SISA would have impacted on him ... given that previously all negotiation with SISA resulting in benefits also accrued to Dr. Wickham although he may not have been a member.*"

[53] From our perusal of the transcript of the hearing before the **Tribunal** we perceive no further attempt there by the consultant representative for the Appellant, Mr. Marshall, to establish a relationship of bargaining agency between the Respondent and SISA. Indeed, his strategy appeared rather to be focused on the submission that the consultation with the Appellant as Head of Department satisfied the statutory obligation to consult with him as

an individual employee about to be dismissed for redundancy. Moreover, the response of the General Manager in the preceding paragraph came in response to a question by counsel for the Respondent in cross-examination and was never seized upon for what it was worth by the representative of the Appellant.

[54] During his oral submissions, Mr. Koeiman also urged us to either remit the case to the **Tribunal** for its reconsideration or to reverse the **Tribunal's** holding that was based, in his view, on the need for the Appellant to be a member of the trade union consulted.

[55] He based this submission on paragraph 13 of the decision where the **Tribunal** stated:

> "The Tribunal finds no merit in this argument (that consulting the Respondent as Head of Department about the reduction in the Government subvention and the need for "a drastic reduction in wages and salaries" equated to a consultation with him as employee). Firstly, as Mr. Parris conceded, no discussions were held with the claimant on the list he had submitted...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."

[56] Although the inclusion of the last ten words of these dicta appears to suggest that membership of a union might bear relevance to the nature of the collective consultation mandated, we are of the view that given the nature of the dispute at the **Tribunal** hearing, the thrust of the holding is, in essence,

the distinction to be drawn between a discussion with the employee as head of department and the personal individual consultation required by the relevant **sub-section.**

**(I) Conclusions**

[57] Based on the foregoing discussion, we now state the following conclusions:

(a) The consultation with the employee proposed for redundancy stipulated by section 31 (4) (b) and (6) is consultation with that employee *qua* individual employee and not *qua* his office or position, such as supervisor, head of department or as chief executive officer, for examples.

(b) The "representative" referred to in section 31(6) is more clearly defined in section 31 (4) (b) as "the trade union recognized for the purpose of bargaining on behalf of the employee (if there is one)."

(c) The subsection 31 (4) (b) does not stipulate a relationship of membership between the union recognized by the employer for the purpose of bargaining and the affected employee. Rather, it demands a relationship of bargaining agency between the affected employee as a member of the barraging unit for which the union is recognized as bargaining agent by the employer.

(d) Such a relationship must however be established on the evidence on a balance of probability. In the Tribunal hearing, the Appellant never seriously sought to establish this relationship once the Tribunal had indicated its preference for the Respondent to be consulted as an affected employee rather than as head of department. (see: p.162 et seq. of the transcript)

(e) The tactic employed here by learned counsel for the Appellant to make consultation with the representative the point at issue therefore amounts to an attempt to present an argument that was not taken in the tribunal below. The respected literature views this

with disfavour. The editors of *Blackstone's Civil Practice 2011* observe:

> "An appellant is not allowed to present a totally new argument that is not stated in the grounds of appeal and was not taken in the court below…There is a discretion to permit a new point on appeal if there is a sufficient reason. This may arise where there has been a recent legal development…"

[58] And *Adrian Zuckerman* in his text *Zuckerman* on *Civil Procedure Principles of Practice (Fourth Edition)*, notes at para 25, 237 under the caption, "**Appeal court does not generally entertain fresh arguments or evidence on appeal**":

[59] "As already noted, the appeal process is not meant to be a re-run of the lower process. It normally consists of a review of the proceedings in and the judgment of the lower court. For this reason, the parties cannot as a matter of general rule, advance new arguments or adduce fresh evidence on appeal. This principle not only represents the limitations of the appeals process but also reflects the law's commitment to finality of litigation. There is a strong public interest in bringing litigation to a close so that persons may be secure in their rights and so that court resources may not be wasted by repeated litigation over the same issues,"

[60] He quotes in support this dicta of *Hale L.J.* in **Hertfordshire Investments Ltd. v Bubb [2000] 1 WLR 2318 at 2334:**

> "...it is in the interests of every litigant and the system that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed..."

The Applicants is therefore not permitted to raise that issue at this stage of the proceedings.

**(J) Disposition**

[61] **The appeal is dismissed, and the decision of the Tribunal is affirmed. There is no order as to costs.**

**Chief Justice**

**Justice of Appeal** **Justice of Appeal**