

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division  
2016/COM/lab/00089**

**BETWEEN**

**MACKEL NEELY  
GLENN WHITE  
CURTIS BROWN  
DENNIS ADDERLEY  
SAMUEL RAHMING  
CHRISTOPHER BRENNEN**

**Plaintiffs**

**AND**

**BAHAMAS ENGINEERING SERVICES & TECHNOLOGIES LTD.**

**Defendant**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Obie Ferguson Jr for the Plaintiff  
Lakeisha Hanna for the Defendant**

**22, 23 April 2021 and 26 July 2021**

**JUDGMENT**

## **WINDER, J**

These are the claims of the several Plaintiffs claiming that their dismissal from the employment of the Defendant (BEST) was unfair.

[1.] I accept the facts as set out in BEST's closing submission and I gratefully repeat them here, with minor amendments, in the following paragraphs.

[2.] The Atlantic Undersea Testing and Evaluation Center ("AUTECH") on Andros Island, is a facility which the United States of America's Navy uses to conduct deep sea water testing and evaluations for underwater acoustic measurement. It tests sonar and provides accurate underwater, surface and air tracking data on ships and weapons in support of the U.S. Navy's antisubmarine and undersea research and development programs.

[3.] From March 1999 to April 2005, a company called Range Systems Engineering Support operated the AUTECH base and paid the National Insurance contributions for all employees who worked at the AUTECH base in Andros.

[4.] Range Systems Engineering Support operated as a subsidiary of Raytheon Technical Services Company LLC. Raytheon Technical Services Company LLC was the company who was awarded the contract to operate and maintain the AUTECH base on Andros between the years 1997 and 2005. Subsequent to the expiration of Raytheon Technical Services Company LLC's contract, Computer Science Corporation was awarded the contract to operate and maintain AUTECH by the Government of the United States of America. Computer Science Corporation thereafter entered into an Agreement with KIRA, Incorporated for KIRA, Incorporated to manage the operations at the AUTECH base in Andros commencing April, A.D., 2005.

[5.] BEST was incorporated under the Laws of the Commonwealth of The Bahamas on 23 December, 2003. Approximately 1½ years after its incorporation, BEST began

managing the employees at the AUTEK base after being awarded the sub-contract to do so by KIRA, Incorporated.

[6.] In June 2016, Tlingit Haida Tribal Business Corporation (“THTBC”) acquired KIRA, Incorporated. THTBC issued a press release dated 22 June 2016 which spoke to KIRA, Incorporated having been in operation as a US federal government contractor for over 28 years and THTBC acquiring the entire business operations of KIRA, Incorporated at the various US facilities. The press release spoke to there being no loss of jobs as a condition of the sale.

[7.] In the restructuring of its new acquisition, THTBC created several companies inclusive of the KIRA Range Services LLC, to manage its businesses and operations. KIRA Range Services LLC was incorporated under the tribal code of the Central Council of the Tlingit Haida Indian Tribes of Alaska, a federally recognized Tribe in the United States of America, on 17 August 2016. The name KIRA was utilized in the incorporation by THTBC, it was said, due to its strong industry recognition. However, KIRA Incorporated and KIRA Range Services LLC are completely separate and distinct entities, which are not related.

[8.] On 22 December, 2014, by a Certificate of Recognition, the General Workers Union (the Union) was recognized as the Bargaining Agent on behalf of the non-managerial employees of BEST. However, at the date of the Plaintiffs' termination, no Industrial Agreement was agreed, entered into and/or signed by BEST and the Union on behalf of BEST's non-managerial employees. The Union and BEST met on several occasions for the purpose of negotiating an Industrial Agreement. However, no agreement was ever concluded between the Union and BEST prior to the sale of KIRA, Incorporated.

[9.] The Plaintiffs were all employed with BEST since, in some cases, as far back as 2005. In September 2016, following the acquisition of KIRA, Incorporated by THTBC, BEST lost its sub-contract to manage the employees of the AUTEK base. This claim was

brought by the Plaintiffs to challenge their subsequent termination by BEST. At paragraphs 17-24 of the Statement of Claim, the Plaintiffs allege that they were unfairly terminated in breach of Sections 45 of the Industrial Relations Act, Section 107 C of the Industrial Relations Code and Section 72 of the Employment Act. As a result of the alleged breach, the Plaintiffs seek the following reliefs:-

- i. A Declaration that the Plaintiffs are entitled to be compensated for wages lost and be returned or re-engaged in his/her job as mandated by the Employment Act.
- ii. An Order requiring the Defendant to give an accurate accounting within 30 days of the ruling for each Plaintiff by the sum found due with interest from the day of the breach to the date of payment.
- iii. A Declaration to dismiss an officer of the Union contrary to Sections 45 and 107C is a breach of the Act and Code of Industrial Relations Practice.
- iv. A declaration that the Defendant is mandated to negotiate with the Union in good faith with a view to the conclusion of an Industrial Agreement;
- v. Reinstatement under Section 43 of the Employment Act; and
- vi. Damages/Compensation under Sections 47 and 48 of the Employment Act.

[10.] BEST denies that the Plaintiffs were unfairly terminated. Their case is that the Plaintiffs were made redundant as a result of the permanent cessation of BEST's business at the AUTEK Base.

[11.] Each of the Plaintiffs gave evidence at the trial, as well as Dr Thomas Bastian, the President of the Union. BEST called Conrad Fernander, its former General Manager, as its only witness.

[12.] Each of the Plaintiffs gave evidence as to their termination from BEST and their belief that their dismissal was related to their involvement in the Union, either as an officer or an influential Union member. Glen White, one of the Plaintiffs, had only been employed since August 18, 2013, approximately, 3 years. The termination letter received by him,

the terms of which were typical of the letters received by the other plaintiffs (except for Mackel Neely), was settled as follows:

23 September 2016

Dear Glen White:

As you are aware, KIRA, has been acquired by [THTBC] and BEST no longer has the contract to provide services to PAE and AUTEK.

BEST has been informed by the new contract services provider KIRA Range Services LLC that it will not be requiring your continued services at AUTEK. Accordingly, as BEST no longer has any business to transact, it is obliged to terminate your services at AUTEK.

In the circumstances the aggregate sum of \$3,009.94 has been deposited to your account, representing, severance pay, notice pay, accrued vacation pay and your final week pay.

BEST would like to take this opportunity to wish you all the best in your future endeavors.

Yours sincerely,  
Conrad Fernander, GM

(Emphasis added)

Glen White, like the other Plaintiffs, were paid in accordance with the formula outlined in the Employment Act for redundancy payments. They all (except for Mackel Neely) acknowledged receiving the funds in their bank accounts and spending the funds. Mackel Neely, unlike the others, received her funds directly.

[13.] Sections 26-28 of the Employment Act provides:

#### REDUNDANCY PAYMENTS

26. (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 and 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) where the employee holds a supervisory or managerial position —
    - (i) one month's notice or one month's basic pay in lieu of notice; and
    - (ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks.
  - (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).
  - (4) Where an employer provides a gratuity or noncontributory pension for an employee, the employee is not entitled to both redundancy pay and the gratuity or noncontributory pension but the employee shall select the one which he prefers.
27. For the purposes of this Part, an employee shall be deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to —
- (a) the fact that 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 fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish:

Provided that an employee shall not be deemed to be dismissed because of redundancy where such employee is required to carry out work for a fixed term of less than two years in respect of a specific construction project and such term has come to an end.

28. (1) Payment of redundancy pay shall be made on or before the date of the employee's redundancy.

(2) A redundancy payment may be recovered as a debt due to the employee in proceedings before the Tribunal.

(3) A redundancy payment shall be a preferred debt in all cases involving bankruptcy or liquidation.

[14.] On the evidence which I accept, BEST's case, that the Plaintiffs were made redundant as a result of the permanent cessation of BEST's business, provides an insurmountable defence. On 21 September 2016 BEST issued a notice, through Conrad Fernander its then General Manager, to all of its employees. The notice read:

BEST wishes to advise its employees that KIRA, has recently been acquired by [THTBC].

[THTBC] is a federally chartered section 17 corporation formed by the Central Council of the Tlingit and Haida Indian Tribes of Alaska.

BEST has been notified by THTBC that it no longer has the contract to provide services to PAE and AUTEK.

THTBC is willing to engage a majority of the BEST employees preserving their tenure and terms and conditions of employment.

The new entity that will provide continuation of services at AUTEK is KIRA Range Services LLC.

Further, KIRA Range Services LLC will shortly be seeking application from BEST employees for continued employment at AUTEK.

(Emphasis added)

The overwhelming and uncontroverted evidence was that BEST, whose own sub-contract to provide services at AUTEK had been terminated, had no other contracts, positions and/or business(es) to transfer the Plaintiffs to. The Plaintiffs' individual contracts were terminated with notice and severance pay (or redundancy pay) under the provisions of the Employment Act. Despite the Plaintiffs' speculation, there was no evidence, which I could accept, as to a connection between BEST and the new employer to displace the law of separate corporate personality.

[15.] I accept that THTBC promised that there would be no positions lost as a result of the acquisition of KIRA, Incorporated. The Plaintiffs however did not work for KIRA, Incorporated but for its subcontractor, BEST. The representations therefore could not be relied upon by the Plaintiffs. The notice, which BEST did issue, was not as absolute and indicated that a majority of the jobs would be saved as a result of THTBC agreeing to engage *a majority of the BEST employees preserving their tenure and terms and conditions of employment.*

[16.] The Plaintiffs seem to be arguing that the new employer, KIRA Range Services LLC, had determined not to hire them because of their prior union involvement. I am not prepared to draw such an inference as there is absolutely no evidence to support that inference other than speculation. In any event this could not impose any liability on BEST as that would have been an act of the new employer, not BEST. Such an inference would also mean that BEST choose to pay these Plaintiffs from its own funds rather than hand them over to the new entity. Again there is no evidence of such a conspiracy. I readily accept that these plaintiffs were among only a few BEST employees who were not hired by the new employer. The vast majority of the Union's members however, returned to the AUTEK Base to work for the new employer.

[17.] The Plaintiffs also raises additional breaches of the Industrial Relations Code in their submissions and in their witness statement. They allege, it seems, a failure to consult the Union prior to the redundancies. These claims however are not pleaded in the Amended Statement of Claim and being unpleaded cannot be raised. In any event, I was not satisfied having regard to the state of affairs which BEST found itself, with the total loss of its business at AUTECH, any remedy could inure to the individual Plaintiffs based upon this claim, if proven. As to the allegation of failing to negotiate in good faith, such a claim is one properly brought by the Union.

[18.] In sum, I was not satisfied that these Plaintiffs were unfairly terminated but that theirs was an unfortunate case of redundancy, for which BEST compensated them. The claims are therefore dismissed with reasonable cost to BEST to be taxed in default of agreement.

Dated this 29<sup>th</sup> day of July 2021

  
Ian R. Winder

Justice