

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 10 of 2007

BETWEEN:

ANNETTE JACKSON

Employee

and

TROP X - TEES BY SHAI WEAR

Employer

Before:

The Hon. M. Althea Crick

The Hon. M. Glendina McKay

The Hon. St. Lawrence de Freitas

Chairperson

Member

Member

Appearances:

Sir Keithlyn B. Smith for the Employee

Employer unrepresented

2010: January 20

2011: June 9

JUDGMENT

Constructive Dismissal: Employee placed on series of suspensions and no work assigned
Unfair Dismissal: Employee claims constructive dismissal was unfair.

- [1] By a Reference filed on October 12, 2007, Sir Keithlyn Smith, acting for the Employee, notified the Court of a trade dispute between the Employee and the Employer. The Employee filed a Memorandum on July 30, 2009. She stated that she was constructively dismissed and the dismissal was unfair. She claimed compensation for unfair dismissal.
- [2] The Employer failed to file a Memorandum in response to the Reference filed by the Employee. Notice of the registration of the Reference was sent by the

Court to the Employee and copied to the Employer on October 18, 2007. A request for an Employee's Memorandum and Witness Statement was also sent to the Employee and copied to the Employer. On November 5, 2007, the Employer's Attorney-at-Law, wrote to the Court requesting an extension of an additional ten days to file the Employer's Memorandum. On October 16, 2009 the Employer's Attorney-at-Law submitted to the Court a copy of a letter written to the Employer advising that for medical reasons he was unable to continue as his Attorney-at-Law on the matter. On October 19, 2009, the Employer was sent a notice for a hearing on November 3, 2009. And failed to make an appearance or send a representative.

- [3] The Employee gave evidence on her own behalf. Mr. Clarence Crump gave evidence on behalf of the Employee.

HISTORICAL BACKGROUND

- [4] The Employer is a garment manufacturer. The Employee, Annette Jackson, commenced her employment with the Employer on November 5, 2001 and worked as a Machine Operator. Her weekly wage was \$ 280.00.
- [5] On May 8, 2004, the Employee had no work to do and requested that her supervisor, Ms. Andrea Wodell, assign her some work. The supervisor instructed another employee, Julie, to give the Employee some work. It is the Employee's claim that Julie threw the work on the floor.
- [6] The Employee reported the matter to the supervisor who told Julie to ***"pick up the work off the floor"***. Julie refused, and an argument between her and Julie ensued. Mr. Frank Lovence on behalf of the Employer called both of them to his office. The Employee explained to him what had transpired. Mr. Lovence

placed the Employee on suspension without pay from May 10 to June 11, 2004.

- [7] The Employee formed the opinion that her suspension was unfair and sought redress from the Antigua and Barbuda Workers' Union. Mr. Clarence Crump, an Industrial Relations Officer with the Union, unsuccessfully attempted to contact the Employer via the telephone. The officer drove to the Employer's place of business where he met the Employer who refused to hold any discussions with him since *"he did not have any time to waste."* The Employee served the full period of her suspension and returned to work on June 11, 2004.
- [8] On June 25, 2004, her supervisor, Ms. Andrea Wodell, overturned a barrel of thread in the path of the Employee who stepped over the thread. The Employee claimed that the supervisor pushed her as she stepped over the barrel. She inquired why she had been pushed. The Supervisor summoned Mr. Lovence on behalf of the Employer. He instructed the Supervisor to turn off the Employee's machine.
- [9] The Employee interpreted this to mean that she should stop working. She asked Mr. Lovence on behalf of the Employer why this was so. He stated that since she took him to the union, he was going to suspend her every month. The Employer suspended the Employee for the period June 25 to July 26, 2004. The Employee fell ill while on suspension and submitted to the Employer a medical certificate for the period July 16 to August 15, 2004.
- [10] The Employee told Mr. Lovence that she was due to return to work that day and she was now doing so. Mr. Lovence did not reply. The Employee returned to the Assistant Manager and asked when she should return to work. The Assistant Manager inquired of Mr. Lovence when the Employee should return

to work. The Assistant Manager informed the Employee that the Employer said, *“that is the only advice he will not give to her.”*

- [11] Subsequent to this last event, several unsuccessful attempts were made by the Employee’s union representative to meet with the Employer in an effort to have the Employee return to work. The Employee did not return to work for the Employer after August 15, 2004.

THE EMPLOYEE’S CASE

- [12] The Employee stated that her name is Annette Jackson. She lives at Villa Area. She was employed by Trop-X by Shai Wear. When shown her Witness Statement, she confirmed that the signature on the statement is hers.
- [13] She stated that she was not given a job description when she joined the company. Mr. Frank Lovence, the managing director, was her immediate boss and was the person who employed her. The **“boss”** referred to in *paragraph [7]* of her witness statement is Mr. Frank Lovence. The assistant manager was Ms. Michelle Donawa. The supervisor was Andrea Wodell. She never received a letter of dismissal.
- [14] She left the office and returned to the Union because she did not know whether or not she was working for the Employer. She spoke to Mr. Crump at the Antigua and Barbuda Workers’ Union. She and Mr. Crump made several attempts to meet with Mr. Lovance, but they were not successful. When they eventually met with Mr. Lovence he said he did not have any time with the Union. He informed the Union that it could do what it wanted to do.
- [15] She was suspended twice; first from May 11 to June 11, 2004 and then from June 25 to July 25, 2004. She was suspended for a second time when the

Supervisor threw a barrel of thread in her path and she stepped over it. The Supervisor asked her why she stepped over it and she explained that she had to pass. The Supervisor then told her to go to the Employer's office and he told her to return at 4:00 p. m. When she did, he gave her a letter which stated that she was suspended from June 25 to July 25, 2004. She asked him why she was being suspended. Mr. Lovence informed her that he intended to suspend her every month.

- [16] Whilst being employed she requested the Supervisor to assign her work to be done. The reason being was that she did not have anything to do. This was piece work. She asked another worker named Julie to give her some work. Julie threw the work on the floor. She did not receive the work. She called the Supervisor's attention to the fact that she was still not working on the task. The Supervisor then asked Julie for the work. Julie told her it was on the floor. Julie asked her if she thought she was better than her to take the work from the floor. The Employee informed her she is not a dog. She would not take the work from the floor. An argument developed between her and Julie. Mr. Lovance called them to the office and suspended her without pay. She was the only employee who was suspended. Mr. Lovance said he would suspend Julie after she came back to work. He failed to do so. Julie is still employed by the Employer. The Employee did not regard her suspension as fair. This is so because Mr. Lovance said he was suspending her because she had taken him to the Trade Union.

Mitigation efforts

- [17] The Employee made applications to Food Court, Epicurean, Calabash Restaurant, Sandals seeking employment. She was not successful. She also did some sewing work. She got between \$75 and \$100 per week for about three months. She was employed with Mr. William DeSilva in September

2005 working with senior citizens. She made \$270.00 per week. She worked there until September 2006. She worked at a restaurant from October 2006 until March 2007. She returned to sewing because she could not get any work. She obtained a housekeeping job in September 2009. She made about \$475 net profit per week from her sewing. She make \$500 per week as a house keeper. She earned her vacation up to 2003. From January 2004 she did not receive any holiday.

- [18] The Employee stated that she is asking the Court to be paid for the days she was suspended; 40% of her pay while she was on sick leave; pay for loss of earnings; and any other award which the Court considers to be just and fair.

THE EMPLOYER'S CASE

- [19] Despite several notices of hearings, the Employer failed to appear. Additionally, the Employer failed to submit a memorandum in response to the filing of the Employee's Reference. The Court was left with no option but to consider only the evidence of the Employee. This decision is grounded in law in keeping with Section 11 of the Industrial Court Act which states:

"In addition to the powers conferred on it under the foregoing provision of this part, the Court may –

(a) Proceed to hear and determine a trade dispute in the absence of any party who has been duly summoned to appear before the Court and failed to do so."

RELEVANT ISSUES

[20] The substantive issues are as follows:

- i) Was the Employee's suspension without pay fair?
- ii) **If the suspension is found to be unfair, what amount, if any, should the Employee recover for the wages lost during the period of suspension?**
- iii) Was the employee dismissed?
- iv) If a dismissal did occur, was it unfair?
- v) If a dismissal did occur and it is found to be unfair, what measure of damages should be paid to the Employee?

THE EMPLOYEE'S SUBMISSIONS

[21] The following submissions were made by Sir Keithlyn Smith on behalf of the Employee:-

- i) the Employee's two suspensions without pay were unfair since in both incidents which led to the suspension the Employee was provoked. Additionally, the second suspension was in retaliation for the Employee's complaint to her Union after her first suspension. Consequently, the Employer should pay the Employee for her wages due for the two periods of suspension.
- ii) the Employee returned to work at the end of her first suspension and fell ill during her second suspension. She submitted a medical certificate and reported to work at the end of her sick leave.

- iii) the Employer's refusal to permit her to work when she returned from her sick leave is constructive dismissal for which the Employee should be compensated.

THE EMPLOYER'S SUBMISSIONS

The Employer made no submissions. See paragraph [19] above.

ISSUE NO. 1

Was the Employee's suspension without pay fair?

- [22] The Employee related the events which led to each of her two suspensions. In both cases she explained that she was not the instigator of the verbal exchange which took place between her and a co-worker. After the first altercation, both she and the co-worker were called to the manager's office. However, only she was suspended. She reported the event to her Union which attempted to contact the manager. Upon her return to work and prior to her second suspension, the manager made clear that he was displeased with her reporting of the first suspension to the Union. After her second suspension, he commented that he intended to continuously suspend her because she had *"taken him to the union."*
- [23] After considering the events related by the Employee and the evidence of the Union representative, Mr. Clarence Crump, the Court has concluded that the Employee was unfairly suspended.

ISSUE NO. 2

If the suspension is found to be unfair, what amount, if any, should the Employee recover for the wages lost during the period of suspension?

The Employee was suspended for fifty working days from May 11, 2004 to June 11, 2004 and June 25, 2004 to July 25, 2004. Having found the suspension to be unfair, we award the Employee \$2,800.00, the wages lost for the during of the two suspensions.

ISSUE NO. 3

Was the Employee dismissed?

- [24] Mr. Lovance on behalf of the Employer never informed the Employee, neither orally nor in writing, that she was dismissed. However, the actions of Mr. Lovance clearly indicated that he no longer wanted her in the Employer's employ.
- [25] The evidence adduced by and on behalf of the Employee is referred to at **paragraphs [14] to [19]** above. On August 16, 2004 the Employee informed Mr. Lovence that she had resumed her work following her period of illness. Mr. Lovence informed the Employee that he was now proceeding on a leave of absence due to illness. She was also informed by the Assistant Manager that she would not be told when she could resume employment. It is reasonable to state that the Employee was unsure whether or not she remained an employee of the Employer. I hold that the Employee was dismissed by the Employer.

If a dismissal did occur, was it unfair?

[24] **The law – constructive dismissal**

The term constructive dismissal is not defined in the Antigua and Barbuda Labour Code. It is defined by reference to the common law. **In Bournemouth University v Buckland [2010] ICR 908. Sedley LJ** stated at **page 914 paragraph [20]** as follows:

“The common law holds that they must be circumstances amounting to a fundamental or repudiatory breach of contract by the employer.”

Jacob L J at **page 919 paragraph [52]** of the report stated *inter alia* as follows:

“Once (the employer) has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party’s right to go. He should have a clear choice; affirm or go.....

That has been the common law rule for all kinds of contract for centuries. It works. It spells out clearly to parties to contracts that if they actually commit a repudiatory breach, then whether the contract continues is completely out of their hands. The rule itself discourages repudiatory breach. In the context of employment law it means that employers know that if they treat an employee so badly as to commit a repudiatory breach, then they cannot hang on to the employee unless they can persuade him or her to decide to stay.”

Discussion

- [25] In this case the Employee clearly demonstrated that she desired to continue to work for the Employer. Her weekly wage was \$280.00. After she returned from a leave of absence on August 16, 2004 the evidence is that she requested work for her to do. No work was given to her by the Employer.
- [26] The Employer's response to her clearly evinced an intention on its part that it did not wish the Employee to continue to work for it. Not even the intervention of the Employee's Trade Union representative could get the Employer to make amends.
- [27] It was the Employer's duty to provide the Employee with work. It also had a responsibility to engender trust and confidence in the Employee. In those two instances it failed to do so.
- [28] In all the circumstances of this case I hold that the Employer's treatment of the Employee was so bad that it amounted to a clear repudiation of a breach of the Employee's contract of employment. The Employer's action entitled the Employee to walk away from the contract of employment. She was constructively dismissed by the Employer and her dismissal was unfair.

ISSUE NO. 5

If a dismissal did occur and it is found to be unfair, what measure of damages should be paid to the Employee?

The Award:

- [29] A person who has been unfairly dismissed is entitled to compensation. The following established heads have been used in computing the award.

[30] **BASIC AWARD**

It has been established that the Employee commenced work on November 5, 2001. Her last weekly wage was \$280.00. Her employment was effectively terminated on August 16, 2004. She is therefore entitled to **\$1,876.00** i.e (33.5 days x \$56.00)

[31] **IMMEDIATE LOSS**

An employee is required to make all efforts to mitigate his/her loss. The Employee applied to some business places in an effort to secure work.

It is clear that the Employee made a meaningful attempt to mitigate her loss. Under this head we award the Employee **\$12,390.00**

[32] **NOTICE PAY**

The Employee is entitled to one week's pay - **\$ 280.00** - in lieu of notice and we so award.

[33] **VACATION PAY**

While the Employee claims vacation pay for 2004, she has not provided the Court with any information of the amount of vacation days she is due. Additionally, the submission made by Sir Keithlyn makes no claim for vacation pay. We therefore make no award under this head.

[34] **COSTS**

We make no award for costs.

[35] TOTAL SUM DUE

The total amount of the award is therefore:

Recovery of wages lost for suspension	2,800.00
Basic Award	1,876.00
Immediate Loss	12,390.00
Notice Pay	280.00

17,346.00

The Employer shall pay to the Employee the sum of \$17,346.00 on or before the **30th day of June, 2011.**

Dated the 8th day of June, 2011



M. ALTHEA CRICK
Chairperson

I agree



M. GLENDINA MCKAY
Member

I also agree



ST. LAWRENCE de FREITAS
Member

