

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 16 of 2009

BETWEEN:

CORALIE HENRY

Employee

and

BARBARA MEYER T/A THE SUGAR MILL SHOP

Employer

Before:

**The Hon. M. Althea Crick
The Hon. Samuel R. Aymer
The Hon. Jessie Kentish**

**Chairman
Member
Member**

Appearances:

**Ms. Gail Christian Attorney-at-Law for the Employee and
Mr. Carden Conliffe Clarke of Commodore & Associates Attorneys-at-Law
for the Employer**

**2011: October 24
2012: June 15**

JUDGMENT

CRICK, A. M.:

- [1] The Employee resides at Five Islands Village in the parish of St. John's in Antigua and Barbuda. The Employer carries on a business known as the Sugar Mill Shop at Hawksbill Hotel as well as other shops at Coconut Beach Resort at Yeptons, the Coco Bay Hotel and Resort at Coco Bay and, the Grand Royal Antiguan at Deep Bay, all in Antigua and Barbuda.
- [2] In a Memorandum filed on August 27, 2009, and amended on August 23, 2011, the Employee claimed that she was employed by the Employer - Barbara Meyer, trading as The Sugar Mill Shop - on October 4, 1993 until September 7, 2005. She

was employed as a Sales Clerk at a basic salary of \$400.00 per week. Her hours of work were 9 am to 5 pm, Monday to Friday. She reported to the Employer or any person designated by the Employer to act in her stead.

- [3] She further claimed that in the month of June 2005 she was informed by her Employer that the business known as the Sugar Mill Shop would cease to function at its location at the Hawksbill Hotel, since its lease which was due to expire during the month of September 2005 was not being renewed. The Employee's last day of work was September 7, 2005.
- [4] The Employee accepted the Employer's offer to continue her employment in another business owned by the Employer. This business, known as "***The Gift Shop***", was located at Coconut Beach Resort at Yeptons, St. John's, Antigua. The terms of employment were unchanged.
- [5] On September 7, 2005, the Employee requested and received one of four weeks vacation due to her. The Employee contended there was an understanding that she would report to "***The Gift Shop***" on September 19, 2005 to continue her employment with the Employer. When she reported to work on the said day she was told that the Employer would telephone her with the details of her work schedule. The Employee immediately telephoned the Employer who informed the Employee that she had temporarily departed from Antigua and Barbuda. The Employee was sent away from the establishment until the details of her work schedule were communicated to her. The Employee never received the details of her work schedule despite her best efforts to contact and liaise with the Employer.
- [6] The Employee secured work with Island Girl Foods on June 17, 2007 as a server/cashier. She earned \$325.00 per week. Her employment with Island Girl Foods ended in September 2010. She has been unemployed since that date.

- [7] In her Memorandum, the Employee contended that *“her dismissal was unfair as no reason or reasons were given for the termination of her services with the Employer and thus claims compensation under the established heads of damages....”* Alternatively, the Employee claimed severance pay.
- [8] The Employer filed her Memorandum and Witness Statements for Barbara Meyer and Kozey Browne on September 30, 2011. Kozey Browne was not called and did not give any evidence whatsoever. In its Memorandum the Employer contended that the business had four branches located at Hawksbill Hotel, Yeptons, Coco Bay and the Royal Antiguan at Deep Bay. The Employee worked on more than one occasion at different locations, notably the setting up of the Royal Antiguan location. The business as a whole did not cease. The Employee was scheduled to continue working from another location under the same terms and conditions.
- [9] The Employer also contended that there was never an agreement to the Employee’s request to work at the *“Gift Shop”* at the Coconut Beach Hotel since the Employee’s cousin, Kozey Browne, was already working at that location. It was agreed that the Employee would return to work at the Royal Antiguan. The Employee was granted one week of four weeks vacation due but not with the understanding that the Employee would return to work at the *“Gift Shop”*.
- [10] Further, the Employer stated that the Employee never reported to work on September 19, 2005 as claimed and there were no instructions informing her that she would receive particulars of her work schedule. Discussions with the Employee centred around the location at which the employee would work - the Coco Bay or the Deep Bay locations - and her dissatisfaction with working at either of these two locations.
- [11] It is the Employer’s submission that every effort was made to satisfy the Employee and facilitate her continued employment. However, according to the

Employer, the Employee never reported to work at any location and therefore abandoned her job. Consequently, she was neither unfairly dismissed nor entitled to compensation for damage or loss suffered.

THE ISSUES

[12] The following are the issues to be considered in this matter:-

- (a) Did a redundancy situation exist on September 7, 2005?
- (b) Was the Employee made redundant and therefore entitled to severance pay as provided for in Section C41 of the Antigua and Barbuda Labour Code?
- (c) Was the Employee temporarily terminated as provided for in section C42 (2) (b) of the Antigua and Barbuda Labour Code?
- (d) If the answer to (c) is yes, was a recall date given at the time of termination?
- (e) Was the Employee recalled to work and if she was, was the recall date within the three month period prescribed in Section C42(2) (b) of the Labour Code?
- (f) If there was no recall date and the Employee was not recalled within the three month period prescribed in C42 (2) (b), what is the award to which the Employee is entitled?

THE EVIDENCE

The Employee

[13] The Employee's evidence as contained in her Witness Statement is that she commenced work as a Sales Clerk at the Sugar Mill Shop located at Hawksbill Hotel in St. John's, Antigua in October 1993. Her gross weekly wage was \$400.00. Her work was sometimes supervised by her employer Barbara Meyer or her daughter, Jessica Meyer.

- [14] Some time in June 2005 she was told by her Employer that the business would cease operations since the lease which expired in September 2005 was not being renewed by the hotel. She was offered alternative employment as a sales clerk by the Employer at another shop located at Coconut Beach Resort, Yepton's Beach in St. John's, Antigua. She accepted the offer.
- [15] On September 7, 2005, her last work day, she sought and was granted, by Jessica Meyer, one week of four weeks vacation to which she was entitled. She was also instructed by Jessica Meyer to report to work at the Shop at Yeptons at 9 a. m. on September 19, 2005. When she reported to work she was told that she would be telephoned at a later time with details of her work schedule. Her attempts to make contact with the Employer to obtain the work schedule were unsuccessful.
- [16] By letter dated September 28, 2005, Ms. Gail Christian, Attorney-at-Law for the Employee, wrote to Ms. Barbara Meyer the Employer. Counsel requested the Employer to pay severance to the Employee. The Employer produced a letter written by her to "**Gail Christianson**", ostensibly, the Employee's Attorney-at-Law, dated November 21, 2005. In that letter Ms. Meyer offers the Employee a sales position at "***the Shop at Deep Bay***" to commence from December 5, 2005. The working hours were from 1pm to 9pm. Learned Counsel for the Employee, however, stated in her written submissions filed on November 15, 2011 that the Employer's offer was received by her on or about the middle of December 2005. The contents of this letter were communicated by Mr. Marcel Commodore of Commodore & Associates Attorneys-at-Law in whose Chambers Counsel for the Employee is employed. The letter was neither signed nor dated.

The Employer

- [17] In her Witness Statement the Employer states, inter alia, that upon advising the Employee that the shop located at Hawksbill Hotel would be closed, she discussed with her the possibility of reporting to another branch. The discussion centred

around which location was best for her to relocate to. The option of moving to the Coco Bay location was refused by the Employee since she considered its location in the Parish of Saint Mary's in the village of Bolans to be too far from her residence.

- [18] The Employee suggested that she be relocated to the shop located at Yeptons Beach. The Employer explained to her that this would not be possible since it was a small location and her cousin Kozey Browne was just recently employed there. For the Employee to be employed at Yeptons Beach would require the dismissal of Kozey Browne whose work was quite satisfactory. The shop located at the Grand Royal Antigua was offered as an alternative location.
- [19] In or around September 2005 the Employee informed her that she was not willing to accept the offer to work at the Grand Royal Antigua since she did not like Wendy DeSouza who was the supervisor at that location.
- [20] The Employer further claimed that neither she nor her daughter ever instructed the Employee to report to work at the Yepton branch on September 19, 2005. The Employer avers that she was out of the island and never received any telephone call from the Employee. During the last week of September 2005 upon her return to the island she penned a letter dated September 26, 2005 to the Employee after hearing her *"on the radio complaining about how wicked [she] was for letting her go after all these years"*. Her only communication from the Employee came through correspondence received from her Attorney-at-Law.

THE EMPLOYEE'S SUBMISSIONS

- [21] Counsel for the Employee submitted that the Employer, through her daughter, Jessica Meyer, offered the Employee, and she accepted, an option to work at "The Gift Shop" at Coconut Beach Resort at Yepton's. The daughter instructed the

Employee to report to work at the Yepton's location at 9 a.m. on September 19, 2005. When the Employee reported to work on the assigned day, she was told that she should await receipt of a work schedule. The promised work schedule was never remitted to her. In fact the Employer's next contact with the Employee, which was in or about the middle of December 2005, was through her Attorney-at-Law when she received an offer of employment from the Employer.

- [22] It was further submitted that with the closure of the Sugar Mill Shop, the job the Employee was hired to do ceased to exist and therefore the issue of redundancy arose. The Court is asked to find **paragraph [19] at pages 11 and 12 of Justice Lewis Hunte's Judgment in Claim No. DOMHCV2004/0381 – Kay Robinson vs Cable & Wireless (Dominica) Ltd.** instructive in respect of this issue. The Employee was entitled to severance pay even though an offer of alternative employment was made.
- [23] The Employee's Attorney-at-Law also pleaded unfair dismissal in the event that the Court finds that a case of redundancy does not exist. In this regard it is argued that the Employee never received the work schedule which she was promised when she reported to work on September 19, 2005. She concluded that the Employee's services were *“brought to an end without any reason(s) being assigned there for.”*
- [24] Counsel for the Employee further submitted that the Employee was unfairly dismissed and in keeping with **Civil Appeal No. 6 of 1992 Antigua Village Condo Corporation v Jennifer Watt**, she is entitled to compensation under the following heads – Loss of protection, Immediate loss of earnings, Future loss of earnings - Vacation pay and Wages from September 1 to 7, 2005.
- [25] On the question of the Employer's evidence, Counsel for the Employee submitted that the Employer's letter dated September 26, 2005 was never delivered to the

Employee. She pointed to the Employer's oral evidence in which she stated that she could not state definitively if the letter was ever sent to the Employee.

[26] Counsel also submitted that, even if the letter was delivered, in it the Employer speaks of "*waiting to see what's going to happen with Royal.....Royal is at 9% I told you the day we closed SMS you would hear from me. You spoke to Jessie last week; she told you I would get back to you as soon as I know anything.....*" The Employer, a week after the date the Employee contends she was to return to work, still did not have a firm date for the Employee's return to work or a position for her at the Royal Antiguan. Under cross examination, the Employer could not say with any certainty when and where the Employee was to report to work.

[27] The Employee was not paid for her last week of work, neither was she paid for the four weeks vacation to which she was entitled. Ms. Christian, Attorney-at-Law for the Employee invited the Court, if it found that the Employee was to be paid severance, to assess a sum due for severance as well as vacation and unpaid wages due.

THE EMPLOYER'S SUBMISSIONS

[28] In his submission, Mr. Clarke, Attorney-at-Law for the Employer stated that the Employee did not report to the Yepton location on September 19, 2005 as she claimed. He pointed to the Witness Statement of the Employer who denied that the Employee reported to work at Yeptons. In any event he stated that the Employer's daughter had made it clear to the Employee that employment at the Yepton's location was not an option, as there was a full complement of employees at that location.

[29] He asked the Court to consider two issues: was the Employee constructively dismissed and did the Employee abandon her job.

[30] Counsel for the Employer cited **Dornella Seth v The Attorney General, claim no. ANUHCv2007/0175** and **Western Excavating (ECC) Limited v Sharp [1978] 1 All ER 713**, in favour of his submission that the issue of constructive dismissal arises in this case.

[31] Counsel for the Employer submits that the Employee's failure to report to work results in an abandonment of her job.

THE LAW

Redundancy

[32] The Antigua and Barbuda Labour Code defines redundancy as,

“a situation in which, by virtue of a lack of customers orders, retrenchment, the installation labour-saving machinery, an employer's going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or substantially diminished”

[33] In **Sundry Workers (Veronica Joseph and Others) and Kings Casino Limited, Civil Appeal No. 28 of 2001**, Byron CJ stated in part at **paragraph [6]** of the judgment,

“.....We were referred to two cases where the provisions were discussed. Antigua Workers Union v Joseph Dew Civil, Appeal No. 2 of 1992 at p. 12 and US Naval Facility v Louis (1983) 31 WIR at p. 191. I think that the main point of relevance to this case is that it is pellucid that for a redundancy there must be the cause and effect. The effect being that the work has ceased or substantially diminished.....”

Constructive Dismissal

[34] The Antigua and Barbuda Labour Code (the Code), in Section C56, states,

“Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.”

[35] Having examined the facts of the case and the case law provided by Counsel for the Employer, we do not agree with him that the issue of constructive dismissal is a matter to be addressed in this case.

Temporary Termination

[36] The Antigua and Barbuda Labour Code makes provision for a situation in which an employer temporarily terminates the services of an employee with the intention of later recalling the employee to work. Section C42 (1) (2) and (2) (b) states as follows:

“(1) Subject to the other provisions of this section, simultaneously upon the termination of employment of an employee entitled to severance pay under section C 40, the employer shall remit to that employee severance pay computed in accordance with section C41.

(2) If the termination is stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination:

Provided however that

a).....

(b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled;

in which case, interest at the rate of ten percent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.”

Job Abandonment

[37] The Antigua and Barbuda Labour Code does not address the question of job abandonment. However, it is generally understood to mean that a job abandonment occurs in circumstances where an employee absents himself from work for an extended period without notification to the employer.

The First Issue

Did a redundancy situation exist on September 7, 2005?

[38] Both sides accept that as a result of the non renewal of the lease for the Employer's operation of her business at Hawksbill Hotel, the business entity known as the Sugar Mill Shop ceased operations. Consequently, the work which the Employee was last employed to perform ceased. These circumstances fit squarely with the Labour Code's definition of redundancy. We find that a redundancy situation existed on September 7, 2005 when the Sugar Mill Shop at Hawksbill Hotel ceased its operations.

The Second Issue

Was the Employee made redundant on September 7, 2005 and therefore entitled to severance pay as provided for in Section C 41 of the Antigua and Barbuda Labour Code?

[39] Having considered the evidence and arguments contained in Counsels' submissions, we have concluded that the Employee was not made redundant on September 7, 2005. It is clear that the Employer intended to continue an

employment arrangement with the Employee. What is not clear is when and where the Employee was to report to work.

The Third Issue

Was the Employee temporarily terminated as provided for in section C42 (2) (b) of the Antigua and Barbuda Labour Code?

[40] We have concluded, after a close examination of the facts and the actions of the Employer between the period September 7 and December 15 of 2005, that the Employee was temporarily terminated on September 7, 2005.

[41] On September 7, 2005 the Employee was granted one of four weeks vacation due. She reported to work one week later and was told that she was required to await a schedule for her return to work. She never received any further communication from the Employer until on or after December 15, 2005. Counsel for the Employer, in an undated cover note or letter to Gail Christian, counsel for the Employee, enclosed a letter dated November 21, 2005 from Barbara Meyer addressed to Gail Christian. The contents of that letter were referred to at **paragraph [16]** above.

[42] What is most telling is the Employer's letter dated September 26, 2005 which indicates that even on that date she still had not determined at which location the Employee would be placed. It is reasonable to conclude, therefore, that there was a temporary termination of the Employee's services while the Employer weighed her option in finding a location for the Employee.

The Fourth Issue

If the answer to (c) is yes, was a recall date given at the time of termination?

[43] It would appear at first that September 19, 2005, the date on which the Employee claimed that she reported to work, was the recall date. However, the Employer advised the Employee when she reported to work that she had to wait to receive a schedule before she could return to work. She was turned away. Additionally, in her letter dated September 26, 2005 the Employer concedes that even at that date she still was not sure where she could place the Employee.

[44] This Court finds that even though there was a promise of work, the Employer had no recall date for the Employee and did not have one until December 5, 2005.

The Fifth Issue

Was the Employee recalled to work and if she was, was the recall date within the three month period prescribed in Section C42 (2) (b) of the Labour Code?

[45] I agree with Counsel for the Employee that the Employer's letter to the Employee dated November 21, 2005 was a last ditch attempt by the Employer to salvage a situation which had already gone contrary to law. One is left to wonder why a letter dated November 21, 2005 never reached Counsel for the Employee until December 15, 2005 and further, why a cover note to that letter, issued by Counsel for the Employer, was not dated. The Employee's evidence that she believes her Counsel's claim that she never received the November 21, 2005 letter until December 15, 2005, was not challenged by the Employer.

[46] We find, therefore, that the recall date was December 15, 2005. Consequently, the recall date fell outside the three month period stated in C42 (2) (b) of the Labour Code.

The Sixth Issue

If there was no recall date and the Employee was not recalled within the three month period prescribed in C42 (2) (b), what is the award to which the Employee is entitled?

[47] Section C42 (2) (b) is clear. If the Employee is temporarily terminated, does not receive a recall date at the time of termination and is not recalled within three months of the termination, she is entitled to severance. We therefore find that the Employee is entitled to the following award.

THE AWARD

Severance

[48] The Employee worked for the Employer from October 4, 1993 until September 7, 2005, a period of 146 months. Her weekly wage was \$400.00, a daily rate of \$80.00. In keeping with section C 41 of the Labour Code she is entitled to one day's pay for each month worked. We award under this head: $\$80.00 \times 143 = \$11,440.00$.

Vacation Pay

[49] The Employee, at the time of her dismissal, was due four weeks vacation. The unrefuted evidence is that although she took one week of her four weeks vacation due, she was not paid for the one week vacation taken. She is therefore entitled to four weeks' vacation pay: \$1,600.00.

Wages

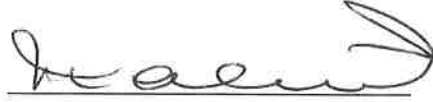
[50] It is the Employee's claim that the Employer did not pay her for the last week she worked at the Sugar Mill Shop. This claim was not challenged by the Employer. Since her last day of work was Wednesday, September 7, 2005, she is entitled to 3 days' pay for that week i.e. \$ 240.00.

[51] The Court declines to make an award for interest in this case. Accordingly the Employer shall pay to the Employee the sum of \$13,280.00 on or before August 31, 2012.

[52] There shall be no order as to costs.

[53] This Court takes the view that Attorneys-at-Law who appear before it should have a full understanding of the law which governs the relevant issues. In this case with the greatest respect to both Counsel, their submissions did not assist the Court in anyway whatsoever.

Dated the 15th day of June, 2012



M. Althea Crick
Chairman

I agree



Samuel R. Aymer
Member

I also agree



Jessie F. Kentish
Member