

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 9 OF 2014

BETWEEN:

BERNADINE RICHARDSON

Employee

and

BIBLE BELIEVERS ARK OF SAFETY PRE-SCHOOL AND DAYCARE

Employer

Before:

The Hon. Dr. Hayden Thomas

Chairman

The Hon. Samuel R. Aymer

Member

Appearances:

Ms. Joy Dublin, Attorney -at- Law of James Dublin & Associates for the Employee

Mr. Lawrence Daniels, Attorney-at-Law of Daniels, Phillips & Associates for the Employer

2015: October 14

2018: May 11

JUDGMENT

Thomas, C

Background

1. The Employer- Bible Believers Ark of Safety Pre-school and Day Care - is a Company duly incorporated under the laws of Antigua and Barbuda and carries on the business of a pre-school and day care center. It is situate at Cassada Gardens, St. John's, Antigua.



2. The Employee Ms. Bernadine Richardson commenced employment with the Employer as a day care worker on or about March, 2006. Her last salary was EC\$1,200.00 per month.
3. The Employee filed a Reference dated 14th March, 2014 with the Industrial Court complaining that she was unfairly dismissed by her Employer. The main issue between the parties is whether she was unfairly dismissed and is entitled to compensation.

The Employee's Case

4. The Employee filed a Memorandum dated 28th November, 2014 with the Industrial Court on 4th December, 2014. It stated *inter alia*:

"Up until March 15, 2013 the Employer had no retirement policy nor was the Employee ever told of any mandatory retirement age. Prior to receipt of the letter notifying her of her termination the Employee had a reasonable expectation that she would continue in her employment for an indefinite period beyond her 60th birthday.

5. By letter dated March 15, 2013 the Employee's employment was summarily terminated on the ground that she had attained the "mandatory age of retirement of sixty (60) years"...
6. The letter was actually dated March 15, 2012 (clearly this should have been March 15, 2013 instead). It states:

"Dear Ms. Richardson,

RE SEVERANCE

The Ark of Safety Day-care and Preschool Board in its annual review of staffing and operations at the facility, has discovered that you have been beyond the mandatory age of retirement of sixty (60) years for some time now. It is therefore the decision of the Board, in the best interest of the Daycare facility and with the growing demands of the daycare service, to accord you the opportunity to take advantage of this milestone in your life, effective 18th March 2013.

As such, we will be offering you the following retirement package as per Section C41 of the Labour Code.

- a) \$1,200.00 which represents one (1) month's pay in lieu of notice
- b) \$ 166.14 - 3 (three) days vacation pay for January to March 2013
- c) \$4,651.92 - which represents severance pay of twelve (12) days pay for each year employed

\$6,018.06 Total

You will receive half (1/2) of this total with receipt of this letter and remainder three (3) months later.

We here at the Ark of Safety Day-care and Child Development Centre, thank you for the years you served with us and wish you all the best as you enjoy your retirement.

Yours truly,

(Sgd.) Coralita Williams

Principal, Chairperson: School Board"

- 7. The Employee contends that "the decision to terminate was founded on her attaining the age of 60 years and was discriminatory and unfair". She felt, moreover, that she did not receive adequate notice of retirement or payment in lieu of notice thereof "and as a result has been unfairly dismissed and is entitled to compensation." She claims one year's salary in lieu of notice of retirement.

The Employer's Case

- 8. The Employer's Case was outlined in a Memorandum dated 12th October, 2015 which was delivered to the Court on 13th October, 2015, barely one day before trial. It should be noted that requisition for the Employer's Memorandum was made by the Registrar of the Court since December 15, 2014.

The Memorandum attempted to provide reasons for the dismissal by stating the following *inter alia*:

- (1) The Employee's work performance was unsatisfactory and she became increasingly lethargic and neglectful in her duties with the children.
- (2) "The Employee sat for most of the day or speak on the telephone for most of the day. Despite repeatedly speaking to the Employee, the Employee refused to make any adjustment to her action or with her ability to care for the children at the pre-school."

- (3) While the Employee was at work she would not feed the children and the parents complained that lunches remained in their children's lunch bags just as they were packed for the children to attend school.
- (4) Due to the Employee's behavior two (2) parents withdrew their children from the pre-school.
- (5) The Employee was sent for formal training in Early Childhood Education but failed the entrance examination.
- (6) Due to persistent complaints from parents a decision was taken to terminate the services of the Employee in the interest and integrity of the pre-school.
- (7) "The Employee was severed having attained the age of 60 years old and not being able to perform her duties in a satisfactory manner."
- (8) "There are no requirements in law for the Employer to pay the Employee the sum of \$14,000.00 in lieu of notice of retirement."

The Issues

9. The issues for determination by the Court are:

- a) Did the Employer have any policy in place at the time of hire of the Employee with respect to a mandatory retirement age? If so, was this communicated to the Employee at the time whether orally or in writing?
- b) Was the Employee given reasonable notice when she was sent on retirement with effect from March 18, 2013?
- c) If the notice period is found to be unreasonable, what damages are due to the Employee?
- d) Was the Employee unfairly dismissed and entitled to compensation?

Legal Parameters

10. Section C56 of the Antigua and Barbuda Labour Code establishes an employee's statutory right not to be unfairly dismissed. It states as follows:

"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."

11. C58(1) of the said Code outlines what constitutes a good cause for dismissal thus:

"C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) Relates to misconduct of the employee on the job, within the limitations of section C59 (1) and (2).

(b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do within the limitations of section C59(5);

(c)

(d)

(e)

Provided, however, that there is a factual basis for the assigned reason."

12. C58 (2) of the Code states:

"The test, generally, for deciding whether or not, a dismissal was unfair, is whether or not, under the circumstances, the employer acted unreasonably or reasonably but even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

Section C59(1) and (2) of the Code makes the following provision:

13. **"C59(1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has:**

(a) Conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b)

(c)

14. (2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give to the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of:

- (a) a repetition of the misconduct ; or
- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given."

15. Section C59(5) states:

"Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and thereafter, if the employee does not, during the period of three months following the receipt of the written warning , demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of said employee."

The First Issue

Did the Employer have any policy in place at the time of hire of the Employee with respect to a mandatory retirement age? If so, was this communicated to the Employee at the time whether orally or in writing?

16. No Witness Statement was provided by the Employer to the Court, neither was any evidence given during the trial to prove that a retirement policy was in place. The Employee, however, through her Witness Statement filed with the Court on 4th December, 2014 and in her sworn testimony at the trial said that she was never presented with any written policy with regard to a mandatory retirement age. She stated that she was never told of any requirement for her to retire at any particular age. She felt that provided she remained in good health, she would have worked up to age 70. She said that she performed her duties satisfactorily and received no complaints from her Employer about her employment. The Employee contended that her dismissal was unfair in that the Employer's decision to terminate her was discriminatory as it was based on her having attained the age of sixty years.

The Employee said that she attempted to start a business by selling cooked meals but it was unsuccessful. She feels that she is entitled to notice pay and is entitled to compensation for the loss suffered from the time of her dismissal to the date of trial.

17. The arguments put forward by the Employee with respect to what she considered to be the indefinite nature of her employment were uncontroverted. Moreover, no Witness Statements were filed by the Employer or Witnesses called to give oral evidence under oath indicating any time limit on the contract. We therefore

conclude that a Retirement Policy did not exist at the time of employment of the Employee and that the contract was indefinite. It was reasonable for the Employee to expect that she would continue working for an indefinite period of time. In this regard, we are mindful of the decision taken in a similar case- the Eastern Caribbean Supreme Court of Appeal case No. 12 of 2002 E. Alex Benjamin Ltd. and St. Lawrence DeFreitas. This was cited in the legal submission made by Ms. Joy Dublin, learned Counsel for the Employee.

18. In that case, Mr. DeFreitas was employed by E. Alex Benjamin Ltd. as Operations Manager. In May, 1998 the employer distributed a Memorandum to its employees stating that it had decided to establish a retirement age policy for all its employees. The age for retirement was to be fixed at 60 years. The Company, however, reserved the right to re-employ persons aged beyond 60.

19. Mr. DeFreitas who was going to attain the age of 60 in August 1998 enquired as to how the policy would affect him and he was advised that specific discussions would be held with him. No such discussions were, however, held. Later, a circular dated 15th June, 1998 and entitled "New Duties from August 5th, 1998" was issued. It mentioned how the duties of Mr. DeFreitas would be distributed following his retirement. This was the first time that Mr. DeFreitas knew that he would definitely be retired. A letter dated 18th June, 1998 addressed personally to him was delivered to him on the same day. It mentioned that a decision was taken that he should proceed on retirement on August 10 when he would have attained his 60th birthday. The employee referred the matter to the Industrial Court claiming that he was unfairly dismissed and sought compensation. He contended alternatively that he had not received sufficient notice or payment in lieu of notice.

20. The Appeal Court referred to the Industrial Court's decision thus:

"In a long and reasoned judgment the Industrial Court held that the appellant's employment was of an indefinite duration and that he should have been permitted to work until he chose to cease or it was clear that he was no longer capable of performing the functions for which he had been hired. The Court also held that an employer may establish for its workers a retirement age policy provided it did so with mutual agreement with its employees or in the absence of same by giving the employee reasonable notice that his employment would be terminated by the establishment of the policy..."

21. The Court of Appeal in Paragraph 13 of its Judgment also agreed with the Industrial Court "that it was unnecessary and unwise to imply that all employment contracts of indefinite duration a term that such contracts would end with the retirement of the employee. To do so would require one to go a

step further and prescribe a universal retirement age. we think this is a matter which is better left to the parties themselves or to Parliament.”

22. Based on the evidence, we find that at the material times the Employer had no policy with respect to a mandatory retirement age.

The Second Issue

Was the Employee given reasonable notice when she was sent on retirement with effect from March 18, 2013?

23. In arriving at a decision, we again sought guidance on the matter from the Court of Appeal decision in the case of E. Alex Benjamin Limited and St. Lawrence DeFreitas cited above. Paragraph 17 of the judgment said *inter alia* “.....The Industrial Court itself, in the present case, adverted to this issue of notice and found, at paragraph 67 of the judgment, that “a period of at least twelve months would have been reasonable notice to the employee” The Appeal Court agreed that twelve months notice would have been appropriate. In a similar case tried in the Industrial Court, Theresa Gregory vs St. John’s Credit Union Ltd. Reference No. 5 of 2010 the Court held that twelve months notice would have been reasonable. In the present case only one month’s pay in lieu of notice was given when the Employee was sent on retirement. Clearly, this short period of notice was unreasonable.

The Third Issue

If the notice period is found to be unreasonable, what damages are due to the Employee?

24. Based on the Appeal Court’s previous decision and also on the decision made by this Court in the Theresa Gregory case, we award one year’s salary as notice pay. At the rate of \$1,200.00 per month this amounts to a total of \$14,400.00.

The Fourth Issue

Was the Employee unfairly dismissed and entitled to compensation?

25. In light of our conclusions at paragraphs 22, 23 and 24 above, it is not necessary to give any further consideration to this issue.

Conclusion

26. Taking all factors into consideration, the Court rules that the Employee is entitled to compensation. This amounts to \$14,400.00 as outlined in Section [23] above. In this regard, an amount of one month's Notice Pay amounting to \$1,200.00 was already paid by the Employer. This should be deducted, leaving a remainder of \$13,200.00 to be paid.

Costs

27. The Court was asked by Counsel for the Employee in her submission to consider costs for the Employee. Costs is usually ordered only in exceptional cases as outlined in Section 10(2) in the Industrial Court Act Cap. 214 of the Laws of Antigua and Barbuda. In the Theresa Gregory and St. John's Credit Union Ltd. cases mentioned earlier, costs of \$7,000.00 were awarded. In the present case, after taking consideration:

- (a) the harsh treatment meted out to the Employee,
- (b) the Employer's disregard for the principles of good industrial relations and,
- (c) the employer's disingenuous attempt to introduce unsubstantiated grounds for dismissal (see paragraph 8 above),

We are of the opinion that costs in the amount of \$5,000.00 would be reasonable.

28. The total sum of \$18,200.00 shall be paid on or before June 10, 2018.

Dated the 11th day of May, 2018.



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Dr. Hayden Thomas
Chairman



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Samuel R. Aymer
Member

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