

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 15 OF 2018

BETWEEN:

COSIER LEWIS

and

PAPARAZZI PIZZERIA & BAR

Employee

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee

Mr. Kwame L. Simon of Chancellor Chambers, Attorney-at-Law for the Employer

2018: June 29

2019: July 24

JUDGMENT

Brown, P;

Background

1. These proceedings were commenced by the Reference of Complaint filed on March 23, 2018 by which the Employee identified the issues in dispute to be constructive/unfair dismissal; service charge and reduction of wages.

2. In her Memorandum of Claim filed on March 23, 2018 the Employee set out relevant background facts and contended that she was unfairly dismissed and is entitled to compensation.
3. In its Memorandum of Defence filed on June 08, 2018 the Employer, Restaurant Paparazzi Company Limited, referred to by its trade name in these proceedings, admitted that the Employee was unfairly dismissed. However, it joined issue with the Employee's Claim on factual grounds and sought a hearing for the assessment of damages payable to her.

The Assessment

4. The assessment was informed by my determination of the facts based on the written and oral testimony of the parties as well as supporting documentary evidence. Naturally, in the process, I assessed the credibility of the Employee on the one hand and Mr. Drego Taibi, the Employer's owner/operator, on the other hand.
5. In the final analysis, based on my findings of fact which are pertinent for the assessment, I award compensation as follows:
 - (1) Payment in Lieu of Notice of Dismissal
I award the sum of \$520.00, as agreed between the parties, being 5 days' pay at the rate of \$104.00 per day.
 - (2) Loss of Protection from Unfair Dismissal
The parties share common ground as to the Employee's entitlement under this heading. As the equivalent of severance entitlement under a redundancy situation, **I award the Employee the sum of \$1,040.00**, being one day's pay for each month of employment. (\$104.00 x 10)
 - (3) Immediate Loss and Future Loss
The Employee testified that in October 2017 soon after her dismissal she found alternative employment at a higher rate of pay. In the circumstances, I accept the Employer's submission that the Employee is not entitled to compensation under these heads.
 - (4) Manner of Dismissal
Although the Employee made no specific claim under this head, Mr. Simon, Counsel for the Employer recognized that "the termination was not in accordance with good industrial practice and relations." Accordingly, the Employer offered compensation in the sum of \$4,506.66, the equivalent of two

months' salary, under this head. However, having regard to the underpinning principles, I make no award under this head.

(5) Exemplary Damages

Exemplary damages may be awarded by the Court under Section 10 (5) of the Industrial Court Act in circumstances where "an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice".

(a) In his effort to justify an award of exemplary damages, Mr. Carty relied on several grounds, the following three of which were admitted by the Employer in its Memorandum:

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- *The Employer did not issue a contract of employment to the Employee.*
- *The Employer did not issue a letter to the Employee advising of temporary lay-off from June to September 2017.*
- *The Employer departed from proper practice and procedure in terminating the Employee."*

(b) In addition to those breaches admitted by the Employer, Mr. Carty also relied on other grounds including the following:

(1) On September 27, 2017 her supervisor, the Employer's Chef "verbally attacked and assaulted" the Employee by cursing her and pointing his hands in her face.

(2) The Employer unilaterally reduced the Employee's rate of pay downwards from \$13 to \$12 per hour.

(c) In my opinion, in the normal course of things, as the Employee's Supervisor the Chef's words and actions were implicitly those of the Employer. Although, Mr. Taibi denied that the Chef was acting on his behalf when the alleged assault took place, I would conclude that the verbal attack and physical assault occurred with at least the prior tacit approval or subsequent condonation of the Employer.

(d) There is no evidence to support the Employer's contention that the Employee was dismissed on account of her "long standing disruptive influence", her "poor work ethic" and "her confrontational disposition". It is unfortunate that the Employer did not at any point formally communicate to the Employee its dissatisfaction with her conduct or otherwise take any disciplinary action against her. Further, in relation to

the employment of the Cuban Waitress, which commenced in September 2017, it was not unreasonable for the Employee to raise her concerns in light of her two lay-offs in the preceding few months. In that regard, the Employer confirmed that the Employee was the only worker laid off on 1st October, 2017. In the circumstances, I conclude that the Employee's lay-off and subsequent dismissal were motivated by reasons other than the seasonal downturn of the Employer's business.

- (e) As to the Employer's decision to reduce the Employee's wage rate from \$13.00 to \$12.00 per hour, I accept the Employee's testimony that she had not agreed and was not aware in advance of the Employer's decision to reduce her wage rate. Similarly, I find that the Employee was not aware in advance of the relocation of the business during the lay-off period between June and September 2017.
- (f) The relocation of the business and the reduction of the wage rate are particularly critical because they were fundamental changes going to the root of the employment contract. In that regard, I am mindful of the general statutory obligation and burden on the Employer under section C 5 of the Labour Code in relation to amendments to the fundamental working conditions. In the circumstances, apart from finding the Employee a more credible witness, I fault the Employer for not formally communicating with the Employee on those important aspects of the employment contract.
- (g) In addition, although Employer asserted that it "had in fact remitted taxes on behalf of the Employee to the various statutory bodies", I find that as at the month May 2017, it had not done so. It was therefore in breach of its statutory obligations.
- (h) Further, although the Employee previously received a designated share of the Employer's service charge fund, I find that she was not paid any share during the first week of September 2017.
- (i) At the end of the day, upon consideration of the limited evidence available on a balance of probabilities, it is my opinion that the Employee has established good grounds for an award of exemplary damages: She was dismissed in circumstances that are harsh and oppressive and not in accordance with the principles of good industrial relations practice.
- (j) Having regard to the Employer's offer of two months' wages in the sum of \$4,506.66 under the heading "Manner of Dismissal", **I award exemplary damages in the sum of \$7,000.00.**

(6) Pay in Lieu of Accrued Vacation

The documentary evidence submitted shows clearly that on the payroll for December 2016 the sum of \$26.00 was deducted from the Employee's weekly pay. In the absence of any contradictory evidence, I conclude that the Employee was in fact paid in lieu of vacation on a weekly basis. As a result I make no award under this head.

(7) Service Charge

The Employee's testimony establishes that she received an average of \$250.00 per week as her share of the service charge fund. Her testimony that she was not paid for September 2017 was not challenged by the Employer. As a result, **I award her the sum of \$1,000.00 under this head.**

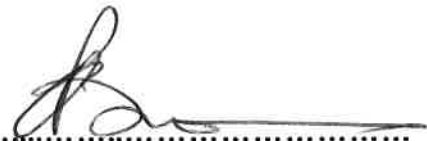
(8) Difference in pay after wages reduced

Given my earlier finding that the Employee received \$1.00 less than the amount to which she was entitled. Accordingly, her weekly entitlement was for an additional \$40.00 (\$8 per day x 5 days per week) **I award the sum of \$160.00 under this head.**

Order

6. In the premises, it is ordered that the Employer do pay to the Employee the total sum of \$9,720.00. Payment of the said sum to be made no later than August 30, 2019.

Dated the 24th day of July, 2019



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Charlesworth O.D. Brown
President

