

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 30 OF 2013

BETWEEN:

NICOLE JOSEPH

Employee

And

AUORA HENTRY t/a
SENSATIONS ADULT TOY STORE

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence deFreitas

Member

Appearances:

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

Ms. Auora Henry, Employer in person

2014: October 2

2018: January 16

JUDGMENT

Brown, P;

Background

1. The Employee commenced her employment with the Employer as a Sales Clerk on February 11, 2008 at the Employer's outlet at Bishopsgate Street, in the City of St. John's which was being opened for the first time on that date. Previously, the Employer carried on business exclusively at its premises on High Street, St. John's.



2. The basic terms of engagement were set out in the employment letter/agreement dated February 5, 2008. It stipulated that the Employee would "report for work at the Bishopgate Street Branch but on occasions you may be scheduled to work at the High Street branch."
3. Due to a lack of sufficient business, the outlet at Bishopgate Street closed in or about April 2008. The Employee was then required to report for work at the High Street Branch where another employee, Ms Ferron, worked. Soon afterwards, both the Employee and Ms. Ferron were required to work on a shortened work week.
4. Ms Ferron went on vacation leave sometime in or about June 2008 during which time the Employee resumed her regular full 40 hour work week. At the expiration of Ms Ferron's vacation, the Employee presented a medical certificate for sick leave for a two week period up to July 9, 2008. After her sick leave the Employee continued to work up to July 19, 2008.
5. By letter dated July 19, 2008 the Employee's employment was terminated on the ground that her employment was "proving a financial burden". Enclosed with the letter of termination was a cheque in the sum of \$1,328.86 inclusive of one week's pay in lieu of notice, vacation pay and wages accrued up to July 19, 2008.

The Dispute

6. In her Memorandum filed on February 17, 2014 the Employee contended that her summary dismissal under the existing circumstances was contrary to law or good industrial relations practices.
7. In her Memorandum filed on March 18, 2014 the Employer contended that the Employee was treated fairly. In that regard, she asserted that:
 - (a) The Employee was employed to work at the outlet at Bishopgate Street.
 - (b) By letter dated April 15, 2008 the Employee was informed that operations at the outlet would be closed on April 21, 2008 and her position would become redundant.
 - (c) By the said letter, the Employee was offered and accepted temporary employment.

The Main Issues

8. The main issues for determination are:

- (1) Whether the Employee's services were terminated as a result of redundancy situation created by the closure of the Employer's outlet store at Bishopgate Street?
- (2) Whether the Employee was offered and accepted temporary employment at the Employer's High Street Branch?
- (3) Whether the Employee was unfairly dismissed?

The Labour Code

9. For present purposes, the relevant sections of the Antigua & Barbuda Labour code are C3, C5 (d), C9 (4), C 40 and C 58 (1) (c).

10. Redundancy is defined in Section C3 as follows:

"C3. In this Division, unless the context otherwise requires

...

"redundancy" means a situation in which by virtue of lack of customer orders retrenchment, the installation of 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;

..."

11. Section C5 provides for the issuance of a statement as follows:

"C5. (1) Every person who employs another shall, within ten days of such employment, furnish said employee with a written statement which shall set forth

...

(d) the term of employment, if other than indefinite;"

12. In relation to notice of termination, section C9 (4) provides:

"C9. (4) Having given due advance notice to terminate employment, an employer may terminate the employment prior to the effective date of termination under the notice, provided that he pay the employee a sum equivalent to that which he would have paid if the employee had worked throughout the period. "

13. An employee's entitlement to severance pay is provided for in section C40:
"C 40. Every employee whose term of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy."

14. Section C58 provides for just causes for dismissal as follows:

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

...
(c) is that the employee was made redundant;
..."

Resolving the Issues

15. The resolution of the three main issues, which we will deal with together, turns largely on questions of fact which we determine, based on the written and oral evidence, as follows:

16. It is clear from the evidence that both parties addressed their minds to the possibility that "things" would not "work out" at the new branch. However, the Employee contended that as a pre-condition for her employment, the Employer assured her that her job would be secure in any event. According to the Employee, at the point where the Employer decided to close the new branch, she reconfirmed that the employment would continue at the High Street location.

17. The Employer's letter dated April 15, 2008 was admitted as documentary evidence at the trial. The Employee denied receiving it. She maintained that she received only two (2) letters from the Employer: the letter of employment and the letter of dismissal.

18. The Employer asserted that after the Employee's position became redundant with the closure of the Bishopgate Street branch, she issued the letter to her on the 15th or 16th of April, 2008. Further, the Employer stated that the Employee's subsequent temporary employment commenced in May 2008 and that she worked with Ms. Ferron for about three weeks before the latter's vacation started. The Employer also insisted that the Employee was never offered full time employment at the High Street branch. She said that she never discussed job security with the Employee.

19. In our analysis of the evidence as a whole, we took into consideration the documentary evidence; the written and oral testimony of the parties including

the demeanor of each of them in the witness box; and the apparent weak state of the Employer's business at the material times. At the end of the day, the Employer's evidence is more persuasive.

20. Our findings of fact are as follows:

- (1) The Employee received no effective guarantee of continued employment at the commencement of her employment or at any subsequent date.
- (2) By reason of redundancy, which was discussed with her in advance, the Employee's employment was terminated from April 21, 2008. As a result of her short period of employment, she was not entitled to any severance pay.
- (3) The Employee was offered and accepted temporary employment at the High Street branch. The period of temporary employment commenced in May, 2008 and ended on July 28, 2008.
- (4) Having given the Employee one week's advance notice of the termination of her temporary employment, the Employer excused her from working after July 19, 2014 and paid her one week's wages to which she was entitled.

Conclusion

21. In the premises, both issues having been resolved in favor of the Employer, we conclude that the Employee was not unfairly dismissed and is not entitled to any compensation. Accordingly, her claim in this Reference is hereby dismissed.

Dated this 16th day of December, 2018.



Hon. Charlesworth O.D. Brown
President



Hon. St. Lawrence deFreitas
Member



Hon. Dr. Hayden Thomas
Member

