



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 43 of 2016

BETWEEN:

JOSETTE SIMMONS

Employee

And

**MATTHEW CAR RENTAL LTD
OTIS AUTO CAR RENTAL LTD
EUGENE MATTHEW
OTIS MATTHEW
CAROLYN MATTHEW-NATION**

t/a

MATTHEW ENTERPRISES/THRIFTY CAR RENTAL

Employers

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence DeFreitas

Member

The Hon. Judith Dublin

Member

Appearances:

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

Mr. Sherfield P. Bowen of Bowen & Bowen, Counsel for the Employers

2017: November 21

2020: July 15

November 13

JUDGMENT

Brown, P:

Introduction

1. At the commencement of these proceedings the Employer was named as Matthew Car Rental Ltd, trading as Thrifty Car Rental. The Employer took issue with being so named. Eventually, based on the Employer's submission at the trial, consensus emerged that there were in fact 4 additional entities who traded

jointly with the Employer and that they should all be added in these proceedings. Accordingly, the heading of the proceedings was amended by adding the names of those 4 additional entities as shown above.

2. Based on that consensus, questions arising from the pleadings regarding the true identity of the Employer, the Employee's scope of the duties and her conduct all fell away. As a result, the main issue left for our determination is: Whether the Employers' unilateral decision to change the Employee's hours of work led to her constructive and unfair dismissal.

Background

3. At all material times, the Employers, essentially comprised of 4 siblings and their father, were engaged as licensees in the business of renting vehicles under the international car rental franchise brand, Thrifty Car Rental.
4. The Employee commenced her employment with the Employers on October 20, 2004 as a Rental Agent. In that position, she was required to work six (6) days per week from 8:00 a.m. to 5:00 p.m. In their letter dated November 01, 2004 the Employers stated her basic working hours as follows:

"Your job descriptions and related duties for which you are employed to work, you are to work six days a week from 8am to 5pm, from Friday to Thursday and off on Sundays and sometimes Saturdays and on holidays. If we need you to work on holidays or on your day off we will pay you extra for it."

5. Over five years later, by letter dated April 12, 2010 the Employee's hours of work were confirmed and her salary was increased to \$500.00. The reconfirmation of her working hours was stated as follows:

"As from April 12, 2010 this is your job description and related duties for which you are employed to work. You are to work six days a week from 8 AM to 5 PM with one hour for lunch, from Friday to Thursday and off one day a week and on holidays. If we need you to work on holidays or on your day off we will pay you extra for it."

6. In or about August 2012 differences arose between the parties in respect of the Employees conduct and the performance of her duties. Upon the intervention of Mr. Stafford Joseph, the General Secretary of Antigua and Barbuda Free Trade Union, (the Union) on behalf of the Employee, the parties met on August 24, 2012 in an unsuccessful attempt at resolving their differences. Following that meeting the parties wrote to each other but those letters did not result in any improvement of the employment relationship.

7. By letter dated August 27, 2012 the Employers informed the Employee that with effect from August 31, 2012 she would be required to work at their Airport Road Office from 9 am to 6 pm". The first paragraph of that letter reads:

"As from August 31st, 2012 you are to come into work at Airport Road Office for 9am to 6 pm with one hour for lunch, or if you want to work from 9 am to 5 pm without a lunch hour let me know in writing. Reason for the change that is the time I need your help mostly."

8. By letter dated August 28, 2012 the Union wrote to the Employers rejecting their unilateral decision and stated the Employee's position that if the Employer insisted on the proposed change in her "normal work-time hours" the Employee would be entitled to her "Terminal Benefits" which the Employers had to be prepared to "make available" to her.
9. The Employers' response as stated in their letter dated August 29, 2012 was to the effect that they were entitled to change the hours of work provided that those hours do not exceed eight in total. In turn, the Employee maintained her position which was communicated to the Employers by the Union's letter dated August 29, 2012.
10. Notwithstanding the continuing differences and the Union's intervention on behalf of the Employee, the Employers wrote directly to the Employee by letter dated August 31, 2012 in the following terms:

"As per our meeting on Thursday August 30, 2012, due to the upcoming slow season in the Tourist Industry we will be keeping the head office which is located on Sir George Walter Highway open later than 5:00pm in the afternoon in order to meet our customer needs.

Effective September 7, 2012 you are required to report to work from 10:00 am to 7:00 pm with one hour for lunch. Please note the schedule is subject to change based on the business needs."

11. The Employee maintained her position rejecting the Employer's proposed unilateral change in her working hours and promptly confirmed the same by letters dated August 31, 2012 and September 4, 2012, respectively.
12. In maintaining their position to vary the Employee's hours of work as they saw fit, the Employers wrote to the Employee by letter dated November 2, 2012 requiring her to work various shifts over a period of 7 days between November 9, 2012 to November 15, 2012. In their letter the Employers stated:

"As per your letter dated August 31st, 2012, we will be making changes to the work schedule; this change will be in effect as Friday November 9, 2012. Please pay attention to the times that you will be required to report

for your duties, while keeping in mind that the schedule will be subject to change based on our business needs.”

The schedule attached required the Employee to work five days between 12 noon and 8pm and one day from 8 am to 5 pm over a 7-day workweek Friday to Thursday as follows:

November 9	12.00 noon – 8: 00 pm
10	8: 00 am – 5: 00 pm
11	Day Off
12	12.00 noon - 8:00 pm
13	12.00 noon – 8.00 pm
14	12.00 noon – 8.00 pm
15	12.00 noon – 8.00 pm

13. On November 9, 2012 the Employee reported for work at 8:00am but the Employers required her to leave and instructed her to return for work at 12:00 noon as scheduled.
14. In response, the Employee resigned her position by letter dated November 9, 2012 in which she quoted selected parts of her Union’s earlier letters and stated that:
- “The continued attempts to arbitrarily make changes to my agreed hours of work are a fundamental breach to my employment contract that will not be accepted by me.”

Discussion

15. In his closing written submissions the Employee’s representative, Mr. Anderson Carty, listed 5 issues for determination. For present purposes, we adopt and adapt two of them as follows:
- (a) Whether the Employer acted reasonably or unreasonably when it sought to unilaterally change the Employee’s hours of work.
 - (b) Whether the Employer’s decision to unilaterally vary the Employee’s hours of work amounted to a fundamental breach of the contract of employment which entitled the Employee to resign and claim that she was constructively dismissed.
16. A useful point of reference is section C 5 of the Antigua and Barbuda Labour Code which requires every employer to furnish each of its employees with a written statement of his working conditions, including his “regular hours of work”. This is a mandatory requirement flowing from the declaration in section C 2 that every workman should know “...what his working conditions shall be...”. It

follows that the hours of work is one of the fundamental components of any employment agreement.

17. It appears that the Employers complied with that requirement by their letter to the Employee dated November 1, 2004, an excerpt from which is set out at paragraph 4 above. Although there is no evidence that the Employee expressly agreed to those conditions, she is deemed to have accepted them by virtue of her subsequent settled course of conduct. Those working hours were reinforced by the Employers in their letter dated April 12, 2010 referred to at paragraph 5 above.
18. It is noteworthy that on at least two occasions in August 2012, the Union wrote to the Employers on behalf of the Employee in respect of issues arising between them. The correspondence exposed strains in the employment relationship which appear to have grown worse over time.
19. The documentary evidence discloses no dispute between the parties in respect of hours of work until August 27, 2012, which means that the hours of work had been fully agreed by the settled course of conduct between the parties for nearly 8 years. Although, the proposed change in that month was not drastic or radical, it appears that the Employer did not consult with the Employee before making the change.
20. By letter dated August 28, 2012, the Union swiftly communicated the Employee's rejection of the proposed change and put the Employers on notice that, rather than complying with any such unilateral variation, the Employee would be prepared to accept the termination of her employment provided that she be paid her "terminal benefits".
21. In their response to the Union's letter, the Employers appear to gloss over the significance of the hours of work as a settled fundamental term of the employment agreement and focused instead on the bare "labour law" requirement that an employee's normal working hours should not exceed 8 hours per day. Obviously, the Employers failed to acknowledge the full role of the Union and the requirement for consultation towards a variation of the hours of work previously agreed.
22. Unfortunately, good sense and reason did not prevail to the extent that the Employers doubled down on their apparently misguided position that, without consultation and consensus, the Employee could be required to work "from any hour in the day to make eight hours". In underscoring its erroneous position, by their letter dated August 31, 2012, the Employers unreasonably pressed on with their attempt to unilaterally vary the Employee's hours of work. On this occasion,

they proposed a more drastic change in the hours of work by introducing a variable shift system which would require the Employee to work from 10.00 am to 6.00 pm, depending on their "business needs".

23. It is noteworthy that in its letter referring to the new shift system, the Employers referred to a meeting the previous day and suggests that their decision was informed by the "slow season in the tourist industry". However, unfortunately, neither party provided any evidence of what was said at that meeting. We are therefore left to conclude that there was no consensus before the new shift system was introduced. Nevertheless, it was scheduled to take effect from September 7, 2012.
24. It is common ground that by this time in September 2012 the Employee owned a vehicle which she personally operated to provide public taxi services. As a result, it was not surprising that the Union maintained its position on behalf of the Employee that it rejected the proposed unilateral variation of the Employee's normal hours of work.
25. The Employers' insistence on changing the Employee's hours of work in the face of the continuing objections of the Employee was further communicated to her by the letter dated November 2, 2012, a part of which is quoted at paragraph 12 above.
26. Ultimately, the dispute over the Employee's hours of work came to a head on November 9, 2012 when the Employee reported for work at 8.00 am. At that time, she was told to leave the premises and report back for work at 12.00 noon in accordance with the new shift system. It was at this point that the Employee concluded that she had been constructively dismissed and communicated that conclusion in writing the Employers.
27. Before stating our final conclusion, it may be important to note our careful consideration of the evidence of Mr. Otis Matthew. Generally, in light of the Employers' letters to the Employee and those passing between them and the Union, we find his testimony to be unreliable. In particular, we note his statement that the Employee received the increase in her salary from \$400.00 to \$500.00 in 2006 when in fact notice of the increase was given by letter dated April 12, 2012 to take effect that same day. Further, we note his assertion that "by the time of her resignation, the Employee had been working shifts at the airport for years" and that "the reason for her resignation letter was her refusal to work her shift".

Resolution

28. In the final analysis, as stated above, the hours of work constitute a fundamental term of the employment contract. Needless to say, being required to work on a variable shift with working hours from 12.00 noon to 8.00 pm is a far cry from working from 8.00 am to 5.00 pm which the Employee had been doing over the preceding 8 years.
29. On the facts of this case, we find that the Employer acted unreasonably when it repeatedly sought to unilaterally change the Employee's hours of work. Moreover, the Employer's decision to unilaterally vary the Employee's hours of work and insisting on implementation of the same, amounted to a fundamental and repudiatory breach of the contract of employment which entitled the Employee to resign and claim that she was constructively dismissed.
30. For the reasons stated above, we resolve both issues in favour of the Employee. She was unfairly dismissed and is entitled to compensation, which we assess as follows.

Compensation

31. In the premises, we award compensation as follows:
- (a) Notice Pay:
Under this head, **we award the sum of \$500.00** being the equivalent of 1 week's pay.
 - (b) Loss of Protection:
The Employee is entitled to the equivalent of one day's pay for each month of employment. **We award the sum of \$8,083.33** (97 days @ \$83.33)
 - (c) Immediate Loss:
Given the limited evidence and the nature of the taxi operations generally, making an award under this head is challenging. The Employee did not testify as to her earnings from that activity during the period of her employment. Based on our limited knowledge of the industry, and given her fulltime engagement after her dismissal, we are of the opinion that she understated her earnings. In our estimation, the period of her loss of earnings should be limited to 6 months. In our view, if she made diligent efforts, her earnings should have increased to at least the amount she earned from her employment. Accordingly, given her evidence that she earned an average of \$250.00 per week over the pertinent 12-month period, **we award the sum of \$6,500.01 under this head**, being the equivalent of 50% of her previous salary for 6 months.

- (d) Having regard to the limited evidence, we make no further award for compensation or costs.

Order

32. Finally, we hereby order that the Employers shall pay the total sum of \$15,083.34 to the Employee, no later than December 18, 2020, as compensation for her unfair dismissal.

Dated this day of November, 2020



Charlesworth O.D. Brown
President



St. Lawrence DeFreitas
Member



Judith Dublin
Member