

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO. 52 of 2019

BETWEEN:

BRIAN COATES

Employee

And

JUDY MCCOY
ANTHONY EMMANUEL

t/a

TONY'S WATERSPORTS, BAR, GRILL & ICECREAM SHOP

Employers

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

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

Mr. Damien Benjamin of Steadroy C. O. Benjamin & Co, Counsel for the Employers

2020: September 18
October 30

JUDGMENT

Brown, P;

Introduction

1. Pursuant to the Order dated June 15, 2020, this Reference was set down for an ex parte trial. That Order and the Notice of Ex Parte Trial were served on the Employers on June 18, 2020 and September 9, 2020 respectively. Having earlier failed to comply with the Industrial Court Procedure Rules, on September 16, 2020, the day before the trial, the Employers filed witness statements. Although they made no application for an extension of time, their witness statements were

admitted as evidence and the Employers were permitted to participate and be represented by Counsel at the trial.

Background

2. At all material times, the Employers were engaged in provision of recreation and hospitality services to customers at their premises on the beach at Dickenson Bay, Antigua. As at March 2018, they had been in business for approximately 27 years.
3. The Employee and the First Employer are siblings who apparently had a good relationship for several years prior to March 2018. Up to that month, the Employee performed miscellaneous tasks on the premises including cleaning the beach, arranging beach umbrellas, chairs and jet skis in consideration of which he was paid \$100.00 per day.
4. On March 2, 2014, a heated exchange of words occurred between the Employee and the Second Employer which, according to the Employee, culminated in his unfair dismissal. In that regard, the Employee contends that, commencing in November 2009 up to that date, he was employed by the Employers as a Water Sports Attendant to perform the said tasks.
5. The Employers deny that the Employee was engaged under a contract of services but conceded that he was paid the said sum from time to time whenever he assisted them by carrying out the tasks. They maintained that the Employee worked independently as a freelancer and assisted them only when it suited him to do.
6. In the circumstances, the issues arising for determination are:
 - 1) Whether the Employee was engaged under a contract of services between himself and the Employers.
 - 2) Whether the Employee was unfairly dismissed.

Discussion

7. It is not disputed by the Employee that the First Employer provided free living accommodation for him for several years after December 2009. Further, it is not in dispute that the Employee did perform selected tasks at the Employers' business. On those bases, I find that there existed an informal reciprocal arrangement between the Employee and the First Employer commencing in or

about January 2010. The relationship does not lend itself to precise description. Suffice it to say, initially, the Employers did not recognize the Employee as one of their workers.

8. However, in her undated letter, which was tendered by the Employee and admitted into evidence, the First Employer stated that the Employee “works here occasionally for the tourist season” and that he “has been laid off since March 27, 2012”. In her later letter dated January 17, 2017, the First Employer made no reference to occasional work but stipulated that his hours of work were 9:00 am to 4:00 pm; that his job title was “Watersport Renting Jet Skis Beach Chairs”; and that he had been employed “for 5 years with a salary of \$500.00 per week”.
9. In relation to those letters, I accept the First Employer’s evidence that they were written at the Employee’s request to assist him in his personal endeavors. As such, I treat the statements in those letters as embellishments of the then existing state of affairs.
10. It is most instructive that at the end of March 2017, the Employers commenced the payment of statutory contributions to the Antigua-Barbuda Social Security Board. Except for August and September, monthly payments continued up to the end of February 2018. The evidence also discloses that the Employers also made statutory payments to the Medical Benefits Board for roughly the same period.
11. It is unfortunate that on the occasion of his registration as an employee the Employer did not use that opportunity to regularize the employer/employee relationship and issue a statement of the terms of employment. Nevertheless, having regard to the oral and documentary evidence, I resolve the first issue in favour of the Employee. In my estimation, by reason of the course of conduct between the parties an employment relationship became settled by early 2014. I find that by that time, the Employee was engaged under a contract of services; that his rate of pay was \$500.00 per week; that he worked largely during the tourist season; that he occasionally worked 6 days per week; and that he was occasionally required to work overtime.
12. As to the second issue, the key question is: What is the effect of the words, taken in context, spoken by the Second Employer to the Employee on March 2, 2018? In answering that question, I take into account the different versions of what was said by the Second Employer to the Employee.
13. In his written submissions, Mr. Benjamin, learned Counsel for the Employers emphasized that the Second Employer’s testimony was not challenged by Mr. Carty, the Employee’s Representative. In light of that observation, I have

considered the two versions as they stand. On the one hand, the Employee testified that the Second Employer told him: "Don't fucking touch my bike; come off me job; you fired...If you only touch my bike, me slap you dung". On the other hand, although the Second Employer admitted having a heated exchange with the Employee, during which he told the Employee to leave the Employers' equipment alone, he denied uttering those particular words.

14. In my view, the Employee's version of the heated exchange between himself and the Second Employer is more plausible. Thus, I find that the Second Employer did unreasonably utter the said dismissive and threatening words to the Employee thereby terminating the employment relationship. More specifically, by reason of the words spoken by the Second Employer, the Employee was unfairly dismissed and is entitled to compensation.

Compensation

15. For the purposes of awarding compensation, I simply have to do the best I can with the sketchy evidence before me. Given the many vagaries and uncertainties normally associated with the type of business carried on by the Employers, the situation requires me to make certain inferences and informed guesstimates where appropriate. In this case, there can be no precise correlation between the direct evidence of any of the witnesses and particular customary headings of compensation.
16. Accordingly, I will assess compensation payable to the Employee within certain parameters which I fix as follows:
- a) the period of employment:- 4 years from March 1, 2014 to March 2, 2018;
 - b) the rate of regular pay:- \$500.00 per week;
 - c) the number of months in a year when the Employee worked for more than 2 weeks:- 7 months;
 - d) the number of public holidays per year, on which he worked and only received his regular pay:- 4 days;
 - e) the number of days per year for which he was entitled to premium pay, but received only his regular pay:- 7 days;
 - f) the number of accrued vacation days per year, for which he is entitled to receive vacation pay: 7 days;
 - g) the number of days on which he was absent due to illness but was not paid: 4 days.
17. In the premises, I assess compensation as follows:
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| a) Notice Pay (5 days' pay) | \$ 500.00 |
| b) Vacation Pay (4 years @ 7 days p/y) | \$ 2,800.00 |

d) Sick Days (4 years @ 4 days p/y)	\$ 1,600.00
e) Premium Pay (4 years @ 7 x 0.5 days p/y)	\$ 1,400.00
f) Loss of Protection (48 months @ 1 day p /m)	\$ 4,800.00
g) Immediate Loss (13 weeks @ 5 days p/ w)	<u>\$ 6,500.00</u>
Total	<u>\$20,000.00</u>

18. And I order that:

- (1) The Employers shall pay to the Employee the total sum of \$20,000.00 in four equal installments of \$5,000.00 no later than November 3, 2020; December 3, 2020; December 24, 2020 and February 3, 2021 respectively.
- (2) No order as to costs

Dated this ~~30~~¹⁵ day of October 2020



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Charlesworth O.D. Brown
President

