



ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ 12 OF 2018

BETWEEN:

DEBBY LOOBY

Employee

and

CENTRAL MARKETING CORPORATION

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. John Benjamin

Member

The Hon. Judith Dublin

Member

Appearances:

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

Mr. Peyton J.V. Knight of Knight & Associates for the Employer.

2021: May 13

2021: July 27

May- Francis, VP.

**REASONS FOR DECISION REJECTING EMPLOYER'S APPLICATION TO STRIKE
OUT REFERENCE**

Introduction

1. By its application filed on February 22, 2021, the Employer applied for an order under Rule 36 of the Industrial Court Rules to strike out the Employee's claim of unfair dismissal on the basis that:
 - (i) the claim is statute-barred
 - (ii) the Employee has no real prospect of succeeding in the absence of the Claim.

2. The matter came up for hearing on May 13, 2021. The application was supported by an affidavit sworn by Ms. Heatherlyn Millet, General Manager of the Employer.
3. After the hearing, the Court made an oral decision rejecting the Employer's application to strike out the Employee's Reference. Immediately after that, Counsel for the Employer requested the Court's reasons in writing.

The Application

4. The Employer sought the following Orders:
 - (i) The Claim filed by the Employee be struck out as it is contrary to section 28 of the Industrial Court Act Cap 214 of 1976 of the laws of Antigua and Barbuda; Section C38 of the Labour Code of the Laws of Antigua and Barbuda Cap 27 and Section 7 of the Limitation Act, No. 8 of 1997 of the Laws of Antigua and Barbuda.
 - (ii) Judgment be entered for the Employer
 - (iii) Costs to the Employer
 - (iv) Such further order or relief that the court deems just.
5. In her Affidavit in Support, Ms. Millet states in paragraph 2:

"I have been informed by my Principals and do very believe that under the Labour Code, the Employee cannot bring a claim for breach of contract or agreement after a period of time has passed. I am further informed my Attorney that pursuant to Section 7 of the Limitation Act, No 8. of 1997 of the Laws of Antigua and Barbuda, that, "An action founded on a simple contract cannot be brought after the expiration of six years from the date on which the cause of action accrued. That it has been almost twenty (20) years since the date from which the claim ought to have been filed".

In paragraph 3, Ms. Millet adds:

"The Labour Code at paragraph identifies that such matters have to be brought within two (2) years and as such the matter should not have been entertained by the Labour Department given the limitation period".

In paragraph 5, Ms. Millet further states:

"That I have also been informed by my principal that section 28 of the Industrial Court Act provides that no industrial action should be taken or brought before the court within six months from the date of the complaint".

The Dispute

6. In its Reference filed on March 12, 2018, the Employee identified the dispute between the parties: "Unfair Dismissal and fair compensation for Unfair Dismissal."
7. In her Memorandum of Claim, the Employee states:

"The Employee commenced lawful employment with Central Marketing Corporation on March 15, 2001. She worked normal working hours on weekdays as she awaited for the agreement to be reflected in writing.

In paragraph 5, the Employee adds:

On Tuesday April 24, 2001, the General Manager, Mr. Clarence Edwards called Mrs. Looby to his office and gave her a contract of Employment which was different to the verbal Agreement. This was brought to the attention of the Corporation, Permanent Secretary Mr. Weston and the Minister Vere Bird Jr.

In Paragraphs 6 and 7, the Employee further states:

"Mrs. Looby continued to function as normal under the understanding that the contract would have been amended to address the areas of conflict." "On 20th May 2001 at 4:00 p.m., Mrs. Looby was called to the General Manager's office and handed an envelope. This contained a letter of dismissal and a cheque. This was done without any warning, notification or feedback whatever".

8. On the other hand, by its Memorandum of Defence filed on February 22, 2021, the Employer states:

"The Employee disclosed an unsigned contract as her basis for her claim and indicated that she was employed from the 15th March 2001 to 24th May 2001. The Employee was offered a contract by the Employer. The Employee did not sign the contract and sought to renegotiate terms and the terms were not accepted by the Employer and there was no contract of employment (emphasis mine). The Employee was never documented as an Employee and as such the Employer does not accept that she was an Employee of Central Marketing Corporation. Thus, the Employer requires the Employee to prove the allegations made by the Employee that she was a contract employee of the Corporation in the true sense of an employment to justify her bringing the claim. The Employer was employed for a brief period of time with the Employer but the Employer chose not to continue with her employment (emphasis mine).

In paragraph 4 the Employer further states:

"The Employee commenced Employment and she was terminated within the probationary period of three (3) months according to the Labour Code of Antigua

and Barbuda. Further no contract of employment was ever signed by the Employer. Thus, the Employer cannot accept that there was any unfair dismissal and requires the Employee to prove the allegations therein."

The Employer's Submissions

9. In summary, the Employer accepted that the Employee commenced employment on March 15, 2001, and that she worked for two (2) months and five (5) days. However, the Employer submitted that the Employee's claim should be struck out on the basis that:
 - a) The written contract was not executed, and that the Employee could not rely on the unsigned contract. The Employer submitted that the Employee did not accept the terms of the contract presented to her, and therefore the Employer was within its right to terminate her employment.
 - b) The Employee waited too long to submit her claim before this Court. The Employer relied on **Carlton Rattansingh v Attorney General of Trinidad & Tobago and Kanahar Doopan (the Comptroller of Customs & Excise) CvA No. 105 of 2000**.
 - c) Sections 28 of the Industrial Court Act Cap 214 of 1977 of the laws of Antigua and Barbuda, C38 of the Labour Code of the Laws of Antigua and Barbuda Cap 27, and Section 7 of the Limitation Act, No. 8 of 1997 applies to this Reference.
 - d) Regarding the prospects of success of the Employee's claim, the Employer indicated according to Section C8 and 9(3) (a) of the Labour Code; it was within its right to terminate the Employee's employment on the basis that Employee had not worked for a period which exceeded the maximum probation period. Further, the Employer gave adequate notice to the Employee as per the statutory provisions of the Labour Code.

The Employee's Submission

10. In summary, the Employee opposed the Application on the bases that:
 - (i) An employment relationship existed between the parties, the Employee worked the usual working hours, and the Employer paid the Employee for work done for two (2) months five (5) days.
 - (ii) Section C38 of the Labour Code deals with matters of a criminal nature, but the complaint of unfair dismissal is not of a criminal nature. Additionally, Section C38 is limited to Part 3 of the Labour Code.

Therefore, the complaint for an offence committed under Part 3 is commenced by the Director of Public prosecutions and is not commenced by the Employee.

- (iii) There was no delay by the Employee in commencing her complaint for unfair dismissal as she commenced the steps to have the matter brought to the attention of the Labour Commissioner within the same year of her dismissal.
- (iv) The Employee is exercising her statutory right to claim unfair dismissal.
- (v) Section C9 does not automatically impose a probation period of three (3) months. That Section C5 (1) (e) supports that probation is not automatic since it provides that a statement of working conditions must state a probation period, if any.

Findings and Reasons

11. The Court finds as follows:

- (i) The Employee has not advanced a claim from wrongful dismissal at common law based on breach of contract but has advanced the statutory right to claim unfair dismissal according to C56 of the Antigua and Barbuda Labour Code.
- (ii) Regarding Section 7 of the Limitation Act no. 8 1997, the Court of Appeal in **Hawksbill Hotel v Dale Abraham HCVAP2013/0014** determined that the Limitation Act created no limitation period for the commencement of an unfair dismissal claim.
- (iii) The Court rejects the Employer's submission that section 28 of the Labour Code provides that no industrial action should be taken or brought before the Court within six (6) months from the date of the complaint. Section 28 of the Industrial Court Act Cap 214 applies explicitly to offences arising under the Act. The Employee's claim, as stipulated in her reference, is for unfair dismissal. An unfair dismissal does not constitute an offence under the Act. Therefore, the requirement under section 28 of the Act for a "**complaint for an offence**" to be made within (6) months from when the matter of such complaint arose does not apply to complaint/reference for unfair dismissal.
- (iv) The Court also rejects the Employer's submission that Section C38 of the Labour Code provides that such matters (unfair dismissal claims) must be brought within two (2) years. Section C 38, which the Employer relies

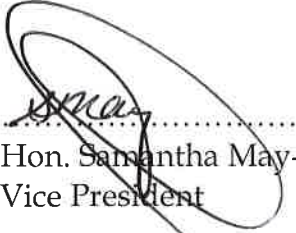
upon, falls under Part 3 of the Labour Code, which contains several offences at Sections C21, C24, C26, C27, C29, C31, 32, and C36. Section 38, as it so states, concerns offences under Part 3 of the Code of which unfair dismissal is not included. Accordingly, the limitation is that there shall be no prosecution for any offence under Part 3 after the expiration of two (2) years from the date of commission of the offence.

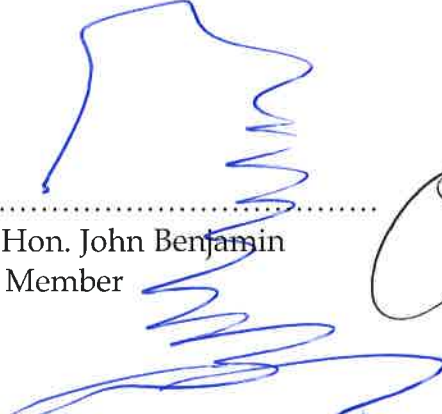
- (v) As stated above, unfair dismissal does not constitute an offence under the Antigua and Barbuda Labour Code. However, an unfair dismissal gives rise to a claim for breach of Section C56 in Part 4 of the Code, the Employee's right not to be unfairly dismissed.
- (vi) Regarding the prospects of success of the Employee's claim, the Employer indicated that in accordance with Section C8 and 9(3) (a) of the Labour Code; it was within its right to terminate the Employee's employment on the basis that Employee had not worked for a period which exceeded the maximum probation period as per the Labour Code. Whether the Employee was employed subject to a probationary period and the duration of that period will be considered based on evidence at trial.
- (vii) Regarding the contention that the Employee took too long to bring a claim before this Court which raises the defence of laches; the Court finds that the delay issue will require the Court to inquire during the trial into the circumstances, consider all the evidence that contributed to or caused the delay, if any, to resolve this issue.

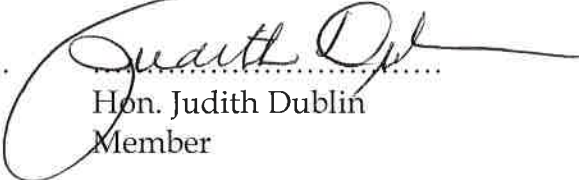
Conclusion

12. The Court dismissed the Employer's Application dated February 22, 2021, for the reasons stated above and ordered costs of \$350.00 to the Employee.

Dated the 26th day of July 2021


.....
Hon. Samantha May- Francis
Vice President


.....
Hon. John Benjamin
Member


.....
Hon. Judith Dublin
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ 12 OF 2018

BETWEEN:

DEBBY LOOBY

Employee

and

CENTRAL MARKETING CORPORATION

Employer

2021: May 13

2021: July 27

JUDGMENT

Hon. Samantha May-Francis, Vice President

Hon. John Benjamin, Member

Hon. Judith Dublin, Member