

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 33 OF 2017

BETWEEN:

CARLA SAMPSON

Employee

And

SHELDON GOMES t/a S.O.G. IDEAL SECURITY SERVICES

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. Samantha May- Francis

Vice President

The Hon. John Benjamin

Member

Appearances:

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

Mr. Justin Simon QC of Simon Rodgers Murdoch, Attorneys-at-Law for the
Employer

2021: May 12

December 8

JUDGMENT

Brown, P.

Background

1. The Employer is engaged in the business of providing security services to private institutions in Antigua and Barbuda. For that purpose, it employed security officers who were deployed from time to time to provide the required services on private premises.
2. The Employee commenced her employment with the Employer as a Security Officer on January 27, 2012. At all material times, she was deployed to the Galley Bay



Resort & Spa at its premises at Galley Bay. She was paid an hourly rate of \$8.20 and was scheduled to work five (5) days per week.

3. On August 12, 2015, the Employee worked the 7:00 a.m. to 3:00 p.m. shift and was posted at the main gate to the Resort. She was responsible for controlling the flow of vehicles entering and leaving the premises. During her shift, the Hotel's Human Resource Director (the Director) who was not known to the Employee, approached the entrance to the Resort and was directed by the Employee to park in the parking area reserved for visitors. In response, the Director requested that he be permitted to park next to the Personnel Office.
4. Based on the settled security procedure as she knew them, the Employee attempted to contact her Supervisor or a member of the Management team for authorization to permit the Director to park in the area which he requested but she was unable to do so. As a result, she was in no position to immediately grant the Director's request.
5. A complaint was made to the Employer against the Employee, as a result of which, on August 13, 2015, the Hotel requested that the Employer immediately remove the Employee from the Resort. In compliance, the Employer, who was off island at the time, gave instructions for the Employee to be relieved of her position and sent home. The subsequent chain of events led to the commencement of these proceedings whereby the Employee claims that she was unfairly dismissed.

The Opposing Cases

6. As stated in her Memorandum filed on January 30, 2018, the main grounds for the Employee's claim are as follows:
 - (a) Since the Director was unknown to her and had not earlier introduced himself to her as such, she followed the known security procedure by denying him permission to park near the Personnel Office.
 - (b) After being relieved of her duties, she was sent home where she remained for a week until she met with the Employer on August 21, 2015. At the meeting, she was informed that there had been a complaint that she was rude to the Director and that the Employer was seeking a meeting with the Resort. In the meantime, he instructed her not to report for duty until he got back to her.
 - (c) Up to September 1, 2015, the Employee heard nothing from the Employer. She received no wages, no instructions to report for work, no letter of dismissal or statement of termination.
 - (d) In the circumstances, the Employee contends that she was unfairly suspended and subsequently constructively dismissed.
7. In his Memorandum of Defence filed on February 20, 2018, the Employer disputes the Employee's claim on the following grounds:

- (a) The Resort no longer wished to have the Employee deployed on its premises because she had failed to follow the proper procedure in handling the Director's request.
- (b) Since there were no alternative job sites to which the Employee could have been posted, and since the Resort did not agree to accept her back on its premises, the Employee was laid-off temporarily for ninety (90) days in accordance with section C42(2) of the Antigua and Barbuda Labour Code (the Labour Code).
- (c) Having secured a new location to which he could deploy the Employee, by letter dated November 4, 2015, he wrote to the Employee recalling her to work on Monday, November 9 but the Employee refused to accept the letter.
- (d) In the circumstances, the Employee was not unfairly or constructively dismissed.

Resolving the Main Issues

8. The main issues arising for our determination are:

- (i) Whether the Employee's services were temporarily terminated?
- (ii) Whether the Employee was constructively and unfairly dismissed?

9. The foundations of the legal framework for resolving the issues are the provisions of sections C 42 and C 56 of the Labour Code. Section C 42 deals with temporary termination of employment. It provides:

"(2) If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination; Provided however that

(b) If no date of recall is given at the time of termination severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled."

10. Section C 56 established the Employee's statutory right not to be unfairly dismissed in the following terms:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer, and no employer shall dismiss any such employee without just cause."

Whether the Employee was temporarily termination?

11. We find the Employee to be a credible witness. In particular, we accept her evidence that the Employer never informed her that she had been or would be laid-off for 90

days. Further, we find that the letter dated August 25, 2015, was never delivered to the Employee and she saw it at the trial for the first time.

12. As to the letter of recall dated November 4, 2015, the Employee testified convincingly that when Police Officer, Malvern Charles, attempted to deliver it to her, she refused to accept because, as the Employer well knew, as she had placed the matter in the hands of her Union Representative, Mr. Chester Hughes who was authorized to receive documents and speak on her behalf.
13. Compared to the Employee, we find the Employer to be less credible. He was generally more tentative and evasive with the result that where differences occur in their evidence, we prefer that of the Employee. It is very instructive that, contrary to what was asserted in his Memorandum of Defence, the Employer testified that the said lay-off letter was not delivered to the Employee. However, he maintained that he informed her of her lay-off during one of his meetings with her. The Employer also admitted that he held discussions with the Employee's Union Representative, Mr. Hughes, but took no steps to have the recall letter delivered to him. He testified that, instead of doing so, he filed away the letter and effectively kept it in his possession. He attempted to justify that action by explaining that Mr. Hughes had earlier warned him to stop harassing the Employee since he had already fired her.
14. Ultimately, the Employer contended that he did not dismiss the Employee. Instead, the employment relationship was terminated because she did not report back to work.
15. We find that, although he was in a position to redeploy the Employee to an alternative location, he failed or refused to do so. We reject his testimony, by way of explanation, that it was not feasible for him to redeploy the Employee as required in the circumstances.
16. In the final analysis, we resolve this issue in favour of the Employee. She was not properly laid off in accordance with the provisions of the Labour Code, which required the Employer to provide her with a written statement upon her temporary termination. Further, we find that, as a result of the Employer's failure or refusal to deliver the recall letter to her or her Union Representative, the Employee was never recalled to resume her duties.
17. For completeness, we note that there is no or no sufficient evidence that the Employee abandoned her job, as the Employer would have us believe.

Whether the Employee was constructively and unfairly dismissed?

18. Having determined that the Employee was not properly laid off, was not recalled and did not abandon her job, the key question remaining is whether the Employer had any just cause for dismissing the Employee. Suffice it to say, the evidence discloses no just cause as required by the Labour Code. Upon careful consideration of all the evidence and upon application of all relevant sections of the Labour Code, we conclude that the Employee was constructively and unfairly dismissed with effect from August 24, 2015. Needless to say, she is entitled to compensation.

Compensation

Outstanding wages:

19. Based on the Employer's evidence, he had requested that the Employee remain at home between August 15 to August 21, 2015, until his return from overseas. The Employee was not paid any wages for that period. **She was entitled to be paid the sum of \$328.00, (\$65.60 x 5) being accrued wages for one week.**

Vacation Pay

20. The Employee's evidence is that she is entitled to pay for 2 weeks accrued vacation. This claim was not convincingly disputed by the Employer. In the circumstances, **we award the sum of \$656.00 under this heading.**

Premium Pay

21. The Employee has not provided sufficient evidence to support her claim for premium pay. As a result, we make no award under this heading.

Notice Pay

22. Since the Employee was paid fortnightly, **we award the sum of \$656.00**, being the equivalent of two weeks' pay, under this heading.

Loss of Protection

23. The Employee worked for 44 months from January 2012 to August 2015. She is entitled to compensation calculated at the rate of one day's pay for each month worked. At the date of termination, the Employee was receiving wages of \$8.20 per hour. Her daily pay amounted to \$65.60. Given her fortnightly pay interval, we **award the sum of \$3,608.00** ($\$65.60 \times 1.25 \times 44$) under this heading.

Immediate Loss

24. The Employee's evidence regarding her efforts to mitigate her loss is scanty, at best. In our estimation, she should have been able to find suitable alternative employment within 3 months after her dismissal. Accordingly, **we award the sum of \$4,264.00**, being the equivalent of 3 months' wages, under this heading.

Future Loss

25. The evidence does not support an award under this heading or those of Manner of Dismissal or Exemplary damages.

Set-off against Debt owed

26. In the circumstances, the total award under the foregoing headings must be set off against any debt owed by the Employee to the Employer. In that regard, the Employer has not proved to our satisfaction that he is owed any amount in respect of payments received by the Employee from the Social Security Scheme. However, the Employee admitted that the Employer is entitled to a reimbursement in the sum of \$307.20. Accordingly, that sum must be set off against the total sum of \$9,512.00 payable to the Employee under the foregoing headings.

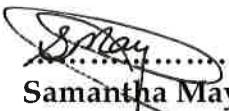
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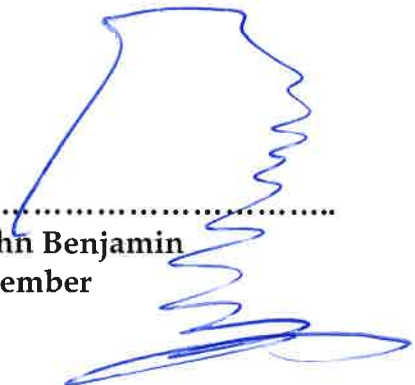
27. By reason of the matters aforesaid, we order that:

1. The Employer shall pay the net sum of \$9204.80 to the Employee, inclusive of her compensation for unfair dismissal, no later than December 31, 2021.
2. There shall be no order as to costs.

Dated this day of 28th December 2021


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Charlesworth O. D. Brown
President


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Samantha May-Francis
Vice President


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John Benjamin
Member