

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO.C/UD/ 41 OF 2016

BETWEEN

DALE FRANCIS

Employee

and

LANCE LEONHARDT t/a JACQUI O'S RESTAURANT

Employer

Before:

The Hon. Samantha May-Francis

Vice President

The Hon. St. Lawrence Defreitas

Member

The Hon. Judith Dublin

Member

Appearances:

Mr. Chester Hughes, Antigua & Barbuda Workers Union, Representative for the Employee

Mr. Justin L. Simon QC of Simon Rogers Murdoch for the Employer

2021: June 08

2021: October 15

JUDGMENT

May-Francis, VP:

The Claim

1. The Employee by Reference No. 41 of 2016 filed on July 22, 2016, claims that the Employer unfairly dismissed him. The Employee sets out his claim in the Employee's Memorandum filed on March 31, 2017, his Witness Statement attached to the Memorandum and filed on March 31, 2017.
2. At the hearing, the Employee raised the preliminary point that the contents of the dismissal letter dated March 3, 2016, do not meet the statutory requirements of section C10 of the Antigua and Barbuda Labour Code (the Code) in that it did not provide



the Employee with a precise statement of the reasons for dismissal. The Employee contended that the Employer is therefore estopped from advancing any evidence or a defence to the reasonableness of the dismissal. The Employer accepted that, based on the provisions of C 10(4) of the Code, it is estopped from introducing evidence to test the fairness of the dismissal and its liability. Consequently, liability was accepted, and the matter proceeded on the assessment of compensation.

Background

3. The Employer Lance Leonhardt is the owner-operator of a seasonal restaurant business on a popular beach in the south of the Island. He trades under the name Jacqui O's Restaurant. The season runs from November to May of the following year.
4. The Employee began working with the Employer in January 2014 as a Beach Guard. After only one (1) month of employment, he was dismissed for gross misconduct. In October 2014, just before the new season, the Employee was rehired as a seasonal worker in the capacity of Waiter for that season commencing October 2014 to May 2015. He resigned at the end of the season in 2015. In November 2015, the Employee was again rehired, this time in the capacity of Floor Manager, once again as a seasonal worker. The Employee last earned a monthly salary of EC\$2,500.00, which was paid fortnightly in the sum of \$1,250.00, plus service charge and tips.
5. All was going well until March 1, 2016, when the Employer discovered that the restaurant had been broken into and over \$5,000.00 in cash had been stolen. The Employer reported the break-in to the Police. As part of its investigation, the Police attended the workplace on March 4, 2016, and took the Employee into custody, where he remained for one day. After that, he was released without charge.
6. On March 8, 2016, the Employee reported back to work. However, based on its internal investigations, the Employer suspected that the Employee had been involved or had prior knowledge of the robbery. As a result, the Employer concluded that it no longer had trust and confidence in the Employee and consequently terminated his employment.

The Employee's case

7. In his Memorandum filed on March 31, 2017, the Employee stated:
 - (i) he was a permanent seasonal worker whose tenure commenced in January 2014 and ended on March 6, 2016; though he did not receive the dismissal letter until March 15, 2016
 - (ii) he earned a basic wage of \$1,250.00 every two (2) weeks and tips of approximately \$1,000.00

- (iii) his dismissal was unfair and harsh; as such, he is entitled to damages for unfair dismissal, manner of dismissal, and loss of income.

The Employer's case

8. The Employer took issue with the Employee's claim regarding compensation and stated:
- (i) The Employee is a seasonal worker who had been given employment for a fixed period of seven (7) months which was the restaurant's operating period each year.
 - (ii) The period of employment was November 2015 until May 2016
 - (iii) The Employee was paid EC\$1,250.00 every fortnight plus service charge and tips
 - (iv) The Employee was not dismissed in a manner that would be considered as being harsh and oppressive.

Issue for Consideration:

9. The Employer having accepted that the dismissal was unfair, the issue for consideration for this Court is the amount of compensation to be paid to the Employee.

Immediate Loss of Earnings:

10. The Employee in his Witness Statement gave evidence that he commenced employment in or around January 2014 and was dismissed on March 6, 2016. During cross-examination, the Employee admitted to being dismissed in 2014 during his probation period. The Employee also accepted that having been rehired in November 2014, he resigned in May 2015 by letter dated May 15, 2015. He stated that the Employer's policy was for employees to leave at the end of the season and then be rehired by the Employer in the following season.
11. The Employer gave evidence that the restaurant is not opened year-round. Instead, the operation commences on November 1st each year and ends in May of the following year. Further, all employees are terminated at the end of each season upon the expiration of a fixed-term contract or resignation. Mr. Leonhardt stated that the Employees are informed of this before being engaged at the beginning of the season.
12. The Employer's unchallenged evidence is that the Employee was given a contract at the beginning of the period. Therefore, he could either resign or be given two weeks' notice of termination of the contract.

13. The Employer asserted that the Employee is not entitled to be compensated with severance pay since the Employee has not worked in an aggregate of one (1) year. The Employee's tenure commenced from November 2015 and lasted until March 6, 2016, a total of five months.
14. Considering the evidence and C40 of the Labour Code, the Court agrees that the Employee is not entitled to severance. The Employer's evidence is that the Employee had been issued a fixed-term employment contract ending in May. The Court accepts that the agreed position was that the Employee would cease working at the end of May. However, the Court believes that it was reasonable for the Employee to expect to remain in employment until the end of the season.
15. The Employee was paid wages up to March 15, 2016. Accordingly, the Court finds that the Employee is entitled to compensation for loss of earnings for the unexpired portion of his fixed-term contract subject to the Employee's mitigation evidence.
16. The Employee gave evidence that he applied to other hotels. He walked around English Harbour to the various restaurants and bars asking for a job, but it was challenging to secure a job in the middle of the season. He eventually started washing cars, but the income was insufficient to meet his financial obligations as he earned between \$160.00 to \$180.00 per week.
17. The Court accepts the Employee's evidence of mitigation. Accordingly, the Employee is entitled to compensation of \$7,500.00, representing three (3) months' pay for lost earnings. However, this award is reduced by the earnings the Employee received from washing cars which, based on his evidence, would amount to \$2,160.00 over the three months. Additionally, the Employee's compensation for immediate loss is reduced by \$1,125.00, the sum paid by the Employer, which represents an additional nine (9) days' pay beyond the date of dismissal. Therefore, compensation under this head is limited to \$4,215.00.

Pay in Lieu of Notice:

18. The Employee is also entitled to receive Notice Pay. The Employee disputed the Employer's claim that he agreed to the termination. Both, however, agreed that upon the Employee's return to work on March 6, there was a conversation where the Employer shared that it had lost trust and confidence in the Employee and that the employment relationship would come to an end. Accordingly, a dismissal letter dated March 3, 2016, was given to the Employee.
19. The Employer's evidence is that all fixed-term contracts would end at the end of each season with two weeks' notice, or the employee would resign. However, the Employer provided no evidence of the fixed-term contract entered into by the

Employee. In any event, the Employee's pay interval was fortnightly, so we find that the Employee is entitled to receive two (2) weeks' pay in lieu of notice in the amount of \$1,250.00.

Loss of Fringe Benefits:

20. The Employer gave evidence that there were two types of tips- the cash tips, which were pooled and distributed every Thursday and Sunday between the employees, and the service charge was paid in arrears every two weeks. The Employer's evidence is that employees usually made tips ranging from \$75.00-\$100.00 per week, and during the high months of December, January, and February, around \$200.00 per week. He did, however, state that the service charge for an employee could be in the region of \$1,000.00 during the high months, and after that, the amounts would vary or decline.
21. Had the Employee continued employment until the end of May, he would be entitled to receive service charge plus tips during that period.
22. The Court finds that the Employee's last pay-slip supports the Employer's evidence that the service charge was paid two weeks in arrears in the region of \$1,000.00. Accordingly, we find that the Employee is entitled to receive a service charge of \$3,000.00 for the months March-May, 2016. Additionally, he is entitled to receive \$1,200.00 in cash tips for twelve (12) weeks. The total amount to be paid to the Employee for loss of fringe benefits is \$4,200.00.

Exemplary Damages:

23. Section 10 (5) of the Industrial Court Act provides that the Court may award exemplary damages in circumstances where "an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice."
24. In exercising this jurisdiction, the Industrial Court considers both the cause for the dismissal and how the dismissal was handled.
25. The evidence is that the Employee was taken into Police custody from work. He was detained and questioned, and released after twenty -four (24) hours. A newspaper publication also placed the Employee in a bad light in relation to this incident. However, the Court finds no evidence that this was due to things said or done by the Employer. The Employer did not even state the reasons for the dismissal in the termination letter. Instead, the Employer's evidence is that it had simply lost trust and confidence in the Employee, considering his close ties and association with the

suspects. Therefore, we make no finding that the Employee was dismissed harshly and oppressively.

Manner of Dismissal:

26. Similarly, the Court finds no evidence that the Employee was dismissed in a manner that affected his ability to get employment. The Employee being questioned and detained by the Police, the fact the incident became public knowledge was not on account of the Employer's actions.

Costs:

27. **Section 10(2) of the Industrial Court Act** provides for costs to be awarded only where exceptional reasons exist. In that regard, the Industrial Court is obliged to regard the principles and practices of good industrial relations. We see no exceptional reason to warrant an order for costs in this case.

Award:

28. The Employee is entitled to compensation as follows:

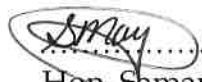
Loss of Earnings	\$ 4,215.00
Loss of Fringe Benefits	\$ 4,200.00
Notice Pay	\$ 1,250.00

Order:

29. By reason of the matters aforesaid, we order as follows:

1. The Employer shall pay compensation of \$9,655.00 to the Employee for his unfair dismissal
2. Payment shall be made no later than November 15, 2021.
3. There shall be no order as to costs.

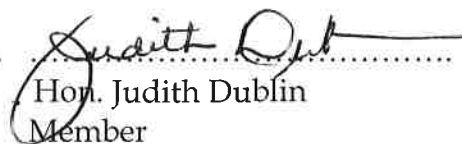
Dated this 15th day of October, 2021



Hon. Samantha May-Francis
Vice President



Hon. St. Lawrence Defreitas
Member



Hon. Judith Dublin
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