

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/47 of 2017

BETWEEN:

ALPHONSO DAVID HENRY

Employee

And

BERESFORD ROMEO

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Judith Dublin

Member

The Hon. John Benjamin

Member

Appearances:

Mr. Samuel James and Simon Leonard of Antigua & Barbuda Free Trade Union
Representative for the Employee

Mr. Septimus A. Rhudd and Aisha Mc Clean of Rhudd & Associates, Attorneys-at-Law for the Employer

2021: July 12
July 16

JUDGMENT

Brown, P:

The Main Issue

1. Having regard to the pleadings, the supporting evidence and the submissions of the parties, the main issue for determination in this Reference is whether the Employee received any or any adequate severance pay to which he is entitled by reason of the termination of his services by the Employer on the ground of redundancy.



Overview of Opposing Cases

2. The Employer is a Businessman, Music Producer and Entertainer. He is the owner of residential premises, known as Lonely Hill Villa situate at Lonely Hill in the Parish of St Philip, which he uses as a vacation home. He ordinarily resides in the United Kingdom.
3. The Employee was first employed by the Employer for an indefinite term on or about May 1, 2000, as a Caretaker, Gardener and Handyman at the Employer's said premises at Lonely Hill. In order to facilitate the unsupervised performance of his duties, the Employee had unlimited access to the premises. To the desired end, the Employer made arrangements for him to obtain gasoline from Frankie's Gas Station, on credit, for use in the Employer's vehicles, riding mower, push mower and weed whacker, all of which were kept on the premises.
4. For a period of years leading up to May 2015 the Employer received reports that the Employee was not performing his duties in accordance with the employment agreement between them. In addition, the Employer became concerned that the Employee had abused the credit facility for gasoline on the basis of which gasoline had been delivered to him from time to time on the Employer's account. Further, the Employer became concerned about some personal items and tools which allegedly had gone missing from his premises or had been damaged and for which the Employee was unable to account.
5. Being concerned about the increasing and unbearable costs of replacing the tools and personal items, and the Employee's failure to report for work as agreed, the Employer decided to implement a three-part action plan to obtain (a) the Employee's admission of several infractions as itemized by the Employer, (b) the Employee's concurrence with a mutual separation agreement in consideration of the sum of \$2,500.00, inclusive of outstanding vacation pay, and (c) a new engagement of the Employee under a one-year fixed term contract commencing on June 1, 2015 under which the Employee would be required to undergo a probation for a period of 90 days, work 8 hours per day for only 3 days per week and receive wages of \$150.00 per day.
6. Accordingly, the Employer prepared or caused to be prepared a mutual separation agreement and a one-year fixed term employment agreement. Both documents were dated May 22, 2015, executed by the parties and witnessed by Jeffrey Hadeed, the Employer's "local representative".

7. To date, the Employee continues to be engaged on the terms and conditions stipulated in the fixed term employment agreement. In effect, he has acknowledged the Employer's right to reorganize or restructure the work he was required to perform. In the circumstances, the Employee acknowledged and accepted the need to terminate the old agreement and replace it with the new one. However, he challenges the validity of the mutual separation agreement on the grounds set out below.
8. While continuing to abide by the terms and conditions of the fixed term agreement, the Employee commenced these proceedings on April 20, 2017, approximately 23 months after he signed the mutual separation agreement. He claims his statutory entitlement to severance pay in accordance with Part 4 of the Labour Code. He contends that he received no pay for his years of service although he requested the same from the Employer.
9. Moreover, the Employee contends that the Employer never indicated to him that he had lost personal items from his property and had never accused him of stealing anything. According to the Employee, when the Employer first informed him that he was reducing his employment to a part time arrangement and placing him on probation, he questioned him as to the requirement for probation and his entitlement to severance pay. In response the Employer stated that his severance entitlement would be used to pay for the tools he damaged.
10. As to the circumstances under which he signed the separation agreement, the Employee contends that he was under pressure at that time. He maintained that he had not seen the documents before they were presented to him for signing. Moreover, the Employee asserted that he did not understand the nature and content of the document, the fact of and reasons for which the Employer was well aware.
11. On the grounds summarized above, the Employee claims Notice Pay, Severance Pay with interest thereon and outstanding Vacation Pay.

Discussion

12. It is common ground that the Employee suffered from a significant limitation of his literacy skills. In our view, that fact required the Employer to be particularly sensitive and circumspect in his dealings with the Employee in matters which required his understanding and appreciation of documents, especially those requiring his signature to signify acceptance of and / or agreement with their contents.

13. This obligation on the part of the Employer is particularly critical given the Employee's previous 15 years of service as at May 22, 2015. This is especially significant because the mutual separation agreement was intended to terminate the pre-existing employment agreement and apply a substantial portion of his statutory severance pay to meet the cost of replacing items damaged or removed from the premises. Further, the Employer's obligation to be sensitive and circumspect was also crucial because he intended to bind the Employee to a new agreement for part time work to replace the earlier one for full time employment.
14. We are of the opinion that at all material times the Employer was mindful of the obvious inequality between his bargaining abilities and those of the Employee. In the circumstances, we find that the Mutual separation agreement was prepared by or on behalf of the Employer without any consultation with the Employee. Further, we find that the Employee had no opportunity to obtain assistance and advise so that he could make a proper informed decision whether or not to agree to the then proposed mutual separation agreement. We have no doubt that the Employee was ill-equipped to either fully appreciate what was proposed or to negotiate on his own behalf.
15. As to the Employee's entitlement to severance pay, we find that this arose by the operation of law. A fact of which the Employer was well aware. Accordingly, the Employee became entitled to receive severance pay upon the termination of his full time employment on May 31, 2015.
16. In order to successfully challenge the Employee's statutory right to severance pay, the Employer would have to prove by positive evidence that he should be paid nothing or an amount less than his statutory entitlement. The burden on the Employer is similar to that on any employer who wishes to prove that a dismissal was not unfair. In terms of the evidentiary burden on the employer, an employee's statutory right to severance pay is to the same effect as his right not to be unfairly dismissed. The burden of proof falls squarely on the employer. Upon careful consideration of the evidence, we find that the Employer has failed to discharge his evidentiary burden.
17. In passing, we have noted the Employer's testimony regarding his groundings with the village community of Freetown, from which both parties hail, and the close relationship between their families. In our estimation, the mutually cordial and respectful relationship which influenced the parties at the start of the relationship in 2000 appear to have been significantly eroded by May 2015. In any event, the circumstances surrounding the Employee's execution of the mutual separation agreement did not reflect the empathy which the Employer would have us believe subsisted throughout their relationship.

18. As to the Employer's actions, we find that he failed to particularize the deductions which he potentially could have made to reduce the final severance package paid to the Employee. Clearly, the Employer's allegations of loss of household items, damage to his machines and equipment and the abuse of his credit facility have not been substantiated. The burden was on him to itemize his loss and satisfy the Court as to his entitlement to reasonable damages for the same. He failed to discharge that burden. His assertion that the loss he suffered was in excess of \$10,000.00 was inadequate to discharge his burden.
19. We find that the Employer failed to sufficiently bring home to the Employee (a) the seriousness of the allegations against the Employee, (b) the quantification of the losses suffered by the Employer, and (c) the details of the Employee's alleged indebtedness which would justify the virtual wipe-out of his severance entitlement.

Resolution

20. In the final analysis, we find that the Employer acted unreasonably in dealing with the Employee on May 22, 2015, and more importantly, when he withheld all or the overwhelmingly significant portion of his severance pay. The Employer's unreasonableness is further underscored by his lumping and limiting of the total net payment to \$2500.00 "inclusive of vacation pay". In our opinion, the Employer had no or no sufficient regard for the duration of the Employee's tenure and the lack of reasonable notice of his redundancy.
21. By reason of matters aforesaid, we would vary the terms of the mutual separation agreement to reflect the Employee's entitlement to severance pay with interest thereon, as claimed, less the amount of \$2,500.00 which he received. In the circumstances, we award the following sums:

(a) Notice Pay: the equivalent of 1 month's wages	\$ 2,500.00
(b) Severance Pay: 1 month's pay for each year's service	\$ 37,500.00
(c) Interest: 10% per annum for 6.13 years to date	\$ <u>22,990.63</u>
TOTAL	\$ <u>62,990.63</u>

Order

22. And we order that:

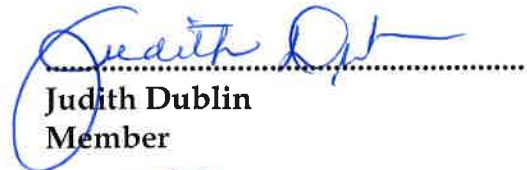
- 1) The Employer shall pay to the Employee the sum of \$60,490.63 as his entitlement to severance pay less the sum of \$2,500.00 previously paid.

- 2) The Employer shall pay costs in the sum of \$2,500.00.
- 3) Payment of the aggregate sum of \$62,990.63 shall be made no later than August 31, 2021.

Dated this 16th day of July, 2021



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Charlesworth O.D. Brown
Chairman



.....
Judith Dublin
Member



.....
John Benjamin
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 21 of 2017

BETWEEN:

JULIO PAYNE

Employee

And

EDMUND CORNELIUS

t/a

EDMUND CORNELIUS TRANSPORT SERVICES

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John Benjamin

Member

The Hon. Judith Dublin

Member

2020: October 30

2021: July 13

JUDGMENT

Brown, P: