

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/6 of 2019

BETWEEN:

ANGELLA CAREY

Employee

And

CARLISLE BAY RESORT

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

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

No appearance of Representatives for the Employer

2020: June 29

2021: January 28

DECISION

Brown, P:

Introduction

1. This Decision provides the written reasons for the Order made orally on June 29, 2020 and subsequently settled whereby the Employer's application to strike out the Employee's claim herein was dismissed.

Background

2. The Employee's Reference of Complaint, accompanied by her Memorandum of Claim, witness statement and bundle of documents, was filed on January 31, 2019. The main issue in dispute between the parties is: "Whether the Employee



was unfairly dismissed". On February 04, 2019, the documents were served on the Employer.

3. In accordance with Practice Direction No. 2 of 2017 the Employee's Memorandum is clearly indorsed with the following warning:

" WARNING OF TRIAL OR HEARING IN YOUR ABSENCE

**TAKE NOTICE THAT IF YOU FAIL TO FILE AND SERVE A
MEMORANDUM OF DEFENCE OR EMPLOYER'S MEMORANDUM
AND WITNESS STATEMENTS IN ACCORDANCE WITH THE
INDUSTRIAL COURT (PROCEDURE) RULES 2015, THE COURT
MAY HEAR AND DETERMINE THE EMPLOYEE'S COMPLAINT IN
YOUR ABSENCE"**

4. By her application filed on February 28, 2019, the Employee applied for an order setting down the matter for an ex parte trial. In the grounds of the application she asserted that the Employer had failed to file and serve its Memorandum within the time prescribed by the Industrial Court (Procedure) Rules 2015 and had shown no interest in defending the claim against it. The application was accompanied by an affidavit in support sworn by the Employee.
5. By an order made in Chambers without a hearing on February 28, 2019 it was ordered that the Reference be set down for an ex parte trial during the second quarter of 2019 on a date to be fixed by the Court Office. The Employer's Memorandum, bare of an application for an extension of time, was filed on the same date after that order was made.
6. The Order for the ex parte trial was served on the Employer on March 07, 2019. On the same date, the Employer filed an application for an order that:

"The Memorandum of Claim be struck out as:

- (a) It discloses no reasonable grounds for commencing the proceedings and/or
- (b) It constitutes an abuse of the process of the Court.

The grounds of the application are:

- (1) The claim is a claim for unfair dismissal that occurred on July 19, 2010.
- (2) The claim was filed on January 21, 2019.
- (3) The employment relationship is one of simple contract and the provisions of Section 7 of the Limitation Act of Antigua & Barbuda apply to these proceedings.
- (4) The Employee is prohibited by Section 7 from commencing any action beyond 6 years from the event complained of."

7. The Employer's application to strike out was supported by an affidavit. In response, the Employee filed an affidavit in opposition on March 14, 2019. The application was set down for hearing on June 29, 2020 and both parties were notified accordingly.

The Hearing

8. The parameters within which the hearing proceeded are largely set by the following Rules:

"6. Purpose

- (1) The main purpose of these Rules is to provide a framework for the just, efficient and expeditious determination of complaints, disputes and other matters referred to the Court.
- (2) When applying these Rules, the Court will have a particular regard for:
 - (a) Individual party interests
 - (b) National and local community interests
 - (c) The Antigua and Barbuda Labour Code
 - (d) Principles of Natural Justice
 - (e) Good industrial relations principles and practices

7. Application of the Rules

- (1) These Rules apply to all proceedings in the Industrial Court.
- (2) The Court may make an order of its own initiative in respect of the compliance with any of these Rules.
- (3) The Court may vary, waive or dispense with the application of or compliance with any of these rules.
- (4) Where these Rules are silent on any procedural issue affecting the determination of any matter before it, the Court may be guided by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000

10. Court Procedure

- (1) The procedure of the Court shall be governed by all relevant statutory provisions of the Act.
- (2) Subject to the Act and these Rules, the Court may regulate its own procedures.

- (3) The President may issue such practice directions and guidelines as may be necessary to give full effect to the provisions of the Act and these Rules.

19. Memorandum of Defence / Employer's Memorandum

- (1) A party wishing to defend himself against any claim made against him must file an Employer's Memorandum or other Memorandum of Defence within 21 days after the date of service of the Employee's Memorandum or other Memorandum of Claim.
- (2) An Employer's Memorandum or other Memorandum of Defence may be accompanied by such Witness Statements as the person filing it intends to rely.

27. Extension of Time

- (1) The time limit for filing any documents under these Rules may be extended by the President on an application in writing by the party requiring such extension stating the reason why the extension is necessary.
- (2) An application for an extension of time by one party must be served on the other party.
- (3) The President may grant an extension of time without a hearing or the consent of the other party.
- (4) A party served with an Application for an Extension of Time may indicate in writing to the President that he consents to or has no objection to or opposes the application.
- (5) An application for an extension of time may be granted although the application is not made after the expiration of the period originally fixed for filing and serving the document.

36. Striking Out a Reference

- (1) The Court may, on the application of any party or on its own initiative, strike out a Memorandum of Claim or a Memorandum of Defence or any part thereof if:
 - (a) It discloses no reasonable ground for commencing the proceedings
 - (b) It constitutes an abuse of the process of the Court

(c) There has been a failure to comply with any of these Rules or any direction or Order of the Court.

(2) An application under this Rule must be in Form 10 of the Schedule and be supported by evidence on affidavit. “

9. On the date of hearing, although the parties had received two weeks’ notice in advance, there was no appearance by or for the Employer and/or its Attorneys-at-Law. And no explanations or excuses were received by the Court on their behalf.
10. Upon hearing submissions from Mr. Samuel A. James of the Antigua & Barbuda Free Trade Union on behalf of the Employee, the Court was persuaded that in lieu of an adjournment, it should consider the application, as filed, and make an appropriate order having regard to all the circumstances.
11. Without prejudice to the Employer’s right to apply for an order setting it aside, the order for an ex parte trial was still subsisting at the commencement of the hearing. However, at that time, the only application before the Court was the one to strike out the Employee’s claim as an abuse of process on the ground that the claim was statute barred under section 7 of the Limitation Act.
12. Having noted the Employer’s reliance on the statutory provision - having regard to the judgment of the Court of Appeal in **ANU HCVAP 2013/ 0014 Hawksbill Hotel v Dale Abraham** in which it was held that the Limitation Act 1997 created no limitation period for the commencement of an unfair dismissal claim - Mr. James submitted that the Employer’s application did not merit an adjournment and should be dismissed.
13. In considering Mr. James’s submission, I was mindful that claims of unfair dismissal, like the one in this Reference, constitute a special category which involve claims to recover damages by virtue of the Antigua and Barbuda Labour Code. As such, a time limit for any action grounded on unfair dismissal could only be considered under section 11 of the Limitation Act and not section 7. I was also mindful of the dictum of the Court of Appeal that: “A claim for unfair dismissal is not a claim for the recovery of a sum in accordance with Section 11 of the Limitation Act 1997.”
14. On those bases, I upheld Mr. James’s submission and dismissed the application for want of prosecution. As to the earlier order for an ex parte trial, since there

was no pending application to set it aside, I determined that it was appropriate to vary it by setting a fresh window for the trial while still leaving the Employer with the opportunity to make a further application. With that in mind, it was ordered that the order made at the hearing be served immediately on the Employer.

15. Further, having regard to all the circumstances, including the fact that the application to strike out was grounded on a point of law already determined by the Court of Appeal, I formed the opinion that an order for costs would be appropriate.
16. At the end of the day, the order was made orally and subsequently settled in the following terms:

"THE REFERENCE having come up for Case Management Conference.

THE COURT noting the absence of the Employer and its Representatives without excuse or explanation.

AND UPON READING the Employer's application to strike out the claim.

HAVING REGARD to the judgment of the Court of Appeal in Civil Appeal ANU HCV AP 2013/0014: Hawksbill Hotel v Dale Abraham.

IT IS HEREBY ORDERED that:

1. This Employer's application to strike out the claim is dismissed.
2. The period of time specified in the order dated 28th February 2019 for setting down the Reference for an ex parte trial is varied to the second half of 2020.
3. The Employee do immediately serve this order on the Employer.
4. The Employer do pay costs in the sum of \$350.00."

Dated this 28th day of January, 2021



.....
Charlesworth O.D. Brown
President