

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO.C/ 33 of 2020

BETWEEN:

EVELYN AARON

Employee

and

AGA DISTRIBUTORS LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel R. Aymer

Member

The Hon. Collin R. Maynard

Member

Appearances:

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

Ms. Safiya Roberts of Roberts & Co., Attorney-at-Law for the Employer

March 1, 2022

April 14

JUDGMENT

Brown, P:

Overview

1. The Employer was incorporated under the laws of Antigua & Barbuda. At all material times it carried on business as the manufacturers and distributors of industrial chemicals from its premises situate at Paynter's Industrial Estate in St. John, Antigua.

2. The Employee commenced her employment with the Employer on April 17, 2001 as an Administrative Assistant. At the date of the termination of her services she held the position of Assistant Manager earning a weekly salary of \$1,100.00.
3. By letter dated September 11, 2018, the Employer wrote to the Employee informing her that on her attainment of the "local retirement age of 60 years" on October 09, 2018 the company would not be in a position to continue her employment. The full text of the letter is as follows:

"September 11, 2018

...

Dear Mrs. Aaron:

As you are aware, our company has for some time been experiencing certain economic difficulties in the market-place in Antigua.

As a result, we are now seriously considering that viability of continuing operations in Antigua. This being the case, I write to officially inform you that upon attaining the local retirement age of 60 years on October 9, 2018, the company will not be in a position to continue your employment.

As I am sure you are also aware, effective the date of this letter you are entitled to a further 23 days of vacation, for which you will receive payment.

I personally, would like to take this opportunity to thank you very much for the years of service to our company, and would also wish you the very best in all your future endeavours.

**Yours very truly,
AGA DISTRIBUTORS LIMITED**

...

Heather Armstrong"

4. On account of financial difficulties, the Employer ceased its operations and discontinued trading in or about January 2020.
5. By her Reference of Complaint filed on July 9, 2020, the Employee claims that she was constructively and unfairly dismissed. The grounds of her claim, as set out in her Memorandum of Claim, include the following:

- (a) Prior to receipt of the letter terminating her services, the Employer had no Retirement Age Policy;
 - (b) There was no “national retirement age of 60 years” on which the Employer could rely;
 - (c) The Employer issued no valid letter of dismissal in accordance with the provisions of the Antigua and Barbuda Labour Code.
 - (d) The Employer acted unreasonably by terminating the Employee’s employment on the basis of the attainment of her 60th birthday.
6. In its Memorandum of Defence, the Employer denies that the Employee was unfairly dismissed and is entitled to any compensation. The main grounds for its position include the following:
- (a) In or about January 2008 the Employer notified all of its staff, including the Employee, that it was instituting a retirement age policy requiring all of its employees to retire upon the attainment of the age of 60 years.
 - (b) The said policy was explained and otherwise referred to by memoranda dated January 22 and 24, 2008 to all staff. In addition, the Employer also referred to “retirement at age 60” in its letter to the Employee dated January 31, 2008.
 - (c) In accordance with the policy, the Employee was retired upon attaining the age of 60 years.

The Main Issues

7. Given the opposing positions, the main issues for determination are:
- (a) Whether the Employer had established a Retirement Age Policy requiring all of its employees to retire at the age of 60 years.
 - (b) Whether the Employee was retired in accordance with the Retirement Age Policy.
 - (c) Whether the Employee was constructively and unfairly dismissed.

Findings of Fact

8. The Employee testified on her own behalf and Mrs. Heather Armstrong, Director and Chief Executive Officer, testified on behalf of the Employer. After careful consideration of the documentary and oral evidence adduced at trial, some of our findings of fact on the balance of probabilities are as follows:
9. Given the commencement date, the Employee’s employment ended on November 9, 2018, after she had taken the balance of her accrued vacation. Her tenure was for a period of 17 years and 7 months.

10. Neither the memoranda issued by the Employer on February 22 and 24, 2008 nor the letter to the Employee dated January 31, 2008, contained a statement or declaration of a Retirement Age Policy.
11. Prior to receipt of the letter dated September 11, 2018, purporting to notify the Employee of her impending retirement date, it had not been brought home to the Employee that her employment was scheduled for termination upon the occurrence of her 60th birthday.
12. The instrument dated March 14, 2014 establishing the Thrift Fund for the benefit of the employees with effect from the same date, does not establish a Retirement Age Policy or a compulsory retirement age.
13. There is not a National Retirement Age in Antigua and Barbuda.
14. The employment of the Employee did not end on October 9, 2018, the date of her 60th birthday, but continued until November 9, 2018.
15. At the expiration of her approved vacation for the period August 13 to October 5, 2018, the Employee's employment continued when she returned to work on October 8, 2018, and was instructed by the Employer to proceed on her outstanding 23 days' vacation.
16. On October 8, 2018, the Employee completed the required Vacation Request Form requesting the outstanding vacation. Her request was approved with the effect that the continuation of employment relationship was mutually affirmed by the parties with the clear understanding that the Employer instructed the Employee and the Employee consented to take the balance of her outstanding accrued vacation during the period October 8 to November 8, 2018.
17. The Employee's dismissal occurred on November 9, 2018 when she returned to work after her vacation.
18. At the date of termination of the Employee's services, the Employer was experiencing "certain economic difficulties" and was "seriously considering the viability of continuing operations in Antigua"

Resolution

19. In order to prove that the Employee was properly retired, it was necessary for the Employer to first establish that it had an enforceable retirement age policy under which the Employee would be retired at the age of 60 years. In addition,

the Employer was required to prove that such a policy was clearly communicated to the Employee within a reasonable time in advance of her 60th birthday.

20. We surmise that the Employer mistakenly equated the then pensionable age of 60 years under the Social Security Act (Cap. 408 of the Laws of Antigua and Barbuda) with a national retirement age by reason of which the Employee was bound to retire at that age.
21. In light of our findings of fact, we are constrained to conclude that the Employer failed to discharge its fundamental evidentiary burden referred to at paragraph 19 above. Accordingly, there is no basis on which to conclude that the Employer had established a Retirement Age Policy requiring all of its employees to retire at the age of 60 years or at all. For that reason, we resolve the first main issue in favour of the Employee.
22. Given that result, the second main issue falls away. Clearly, the Employee could not have been retired pursuant to a policy which did not exist at the material time.
23. In any event, as we found above, the employment relationship continued after the Employee's 60th birthday. Thus, we are obligated to consider the third issue of whether the Employee was unfairly dismissed within the framework of the relevant provisions of the Labour Code.
24. The fountainhead of the Employee's claim of unfair dismissal is Section C 56 of the Antigua and Barbuda Labour Code (the Labour Code) which establishes her right not to be unfairly dismissed.
25. Section C 58 provides essential components of the legal framework. It sets out the parameters within which to determine whether or not a dismissal is unfair. In accordance with that section, the Employer was required to first prove that it had a good cause, grounded on facts, for the dismissal. Secondly, and in addition to the first requirement, the Employer was required to prove that it acted reasonably in dismissing the Employee under the circumstances.
26. It is clear that by November 9, 2018, when it terminated the employment relationship, the Employer was in a position to contemplate the impending occurrence of a redundancy situation which would have provided it with a potentially good cause for dismissing the Employee. However, no reliance was placed on that as a reason for the dismissal. Hence, the Employer issued no written statement citing the precise reason for the termination of the employment relationship on November 9, 2018. Instead, it misguidedly reissued its spent

retirement letter, which had been first issued a month earlier on September 11, 2018 and delivered to the Employee at her home on September 18, 2018 while she was on vacation.

27. In the premises, the Employer has failed to discharge its evidentiary burden of proving that (a) it had a good cause for the dismissal, and (b) it acted reasonably in dismissing the Employee.
28. For the foregoing reasons, we declare that the Employee was unfairly dismissed and is entitled to compensation as assessed below.

Compensation

29. We have carefully considered the quantum of the Employee's claim under the several heads of compensation. In the circumstances, we make the following awards:

(a) Notice Pay

The Employee is entitled to pay in lieu of notice at least equivalent to her weekly salary of \$1,100.00. In this case, having regard to her long tenure, we award the sum of \$2,200.00, being equivalent of two weeks salary.

(b) Loss of Protection

For her loss of protection from unfair dismissal, we award the equivalent of the amount she would have been entitled to if a redundancy situation had been declared by the Employer and her services were reasonably terminated on that basis. Since she worked for 17 years and 7 months, we award the sum of \$83,813.95 $\{(\$4,766.67 \times 17) + (\$4,766.67 \times 7/12)\}$, being the total of one month's pay for each year plus the prorated amount for the last 7 months of her employment.

(c) Immediate Loss

We accept the Employee's evidence that after her dismissal she was engaged in self-employment from which she earned on average a net amount of \$150.00 per week. This sum is \$950.00 less than her previous income. Based on the evidence before us, we award the sum of \$12,350.00 being the total difference in her income for 13 weeks.

(d) Costs

Having carefully considered the Employee's application, we make no award of costs.

Order

30. In the premises, we order that the Employer do pay the aggregate sum of \$98,363.95 to the Employee no later than May 31, 2022.

Dated this 14th day of April, 2022



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Charlesworth O.D. Brown
President



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Samuel R. Aymer
Member



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Collin R. Maynard
Member

