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ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/41 of 2017

BETWEEN:

RICARDO LEON

Employee

and

GALLEY BAY INVESTMENTS LIMITED
t/a GALLEY BAY RESORT & SPA

Employer

Before:

The Hon. Samantha May-Francis
The Hon. St. Lawrence de Freitas
The Hon. Megan Samuel- Fields

Vice President
Member
Member

Appearances:

Mr. Anderson E. Carty of Antigua and Barbuda Tradesmen & United Workers'
Federation Representative for the Employee
Mr. Hugh Marshall of Marshall & Company for the Employer





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2021: June 3, 17

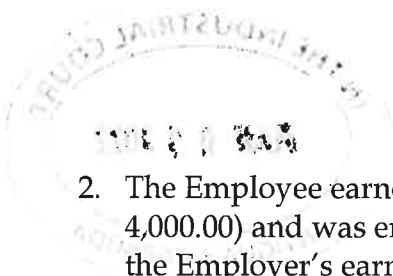
2022: March 9

JUDGMENT

May-Francis VP;

Background

1. The Employer employed the Employee for two (2) years as a Hotel Accountant under a fixed-term employment contract dated July 14, 2016. The Employee commenced work on August 1, 2016, subject to successfully completing a three-month probationary period. Approximately five (5) months later, the Employer terminated the fixed-term contract on January 9, 2017.

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2. The Employee earned Four Thousand United States Dollars per month (USD 4,000.00) and was entitled to receive a 0.5 % bonus of his salary per annum based on the Employer's earnings above one million dollars and subject to other conditions outlined in the fixed-term contract.
 3. The Employee reported to the Finance Director, Ms. Pamella Constantine, who was based overseas in Jersey in the United Kingdom, and the Vice President of Operations & General Manager, Mr. Alex De Brito.
 4. Ms. Constantine previously held the position of Hotel Accountant and was responsible for handing over the responsibilities associated with that position to the Employee. The month of August 2016 presented no issues. Unfortunately, by the end of October 2016, the Finance Director believed that the Employee's performance was unsatisfactory and not to the standards expected. Accordingly, she recommended that the Employee's probation be extended by three (3) months.
 5. On November 2, 2016, the Vice President of Operations & General Manager purported to extend the Employee's probation to February 1, 2017. However, matters further deteriorated, and the Employer dismissed the Employee on January 9, 2017. Consequently, the Employee filed a Reference with this Court on May 8, 2017, in which he claims unfair dismissal and compensation.

The Employee's Claim

6. The Employee claims that:
 - (i) He is an experienced and qualified accountant
 - (ii) As Hotel Accountant, he worked dutifully and with professional competence
 - (iii) During the first three (3) months of employment, the Employer never informed him that he had performed poorly. He had no inclination that his contract was in danger of being terminated.
 - (iv) He was surprised when the Employer advised that his probation period was extended during a meeting with the Vice President of Operations on November 2, 2016. He was presented with a letter dated October 31, 2016, extending his probation.
 - (v) Though he signed the letter purporting to extend his probation, he did so only because he had no choice. There was no doubt that he would have been dismissed if he had not signed the letter.
 - (vi) On January 9, 2017, without incident, the Employer issued him a termination letter terminating his employment alleging that he failed to meet the probation requirements.
 - (vii) The Employer is in breach of the notice provisions under the contract. Furthermore, the extension of the probation period was unlawful and violated the Antigua & Barbuda Labour Code.

- (viii) He was unfairly dismissed as he had performed his duties with competence and had not been made aware of any shortcomings connected with his actual performance as Hotel Accountant.
- (ix) He is entitled to compensation.

The Employer's Defence

7. The Employer's defence is that:
- (i) the Employee presented himself as a qualified and experienced professional Accountant, and therefore the Employer expected that he would be competent in carrying out his duties.
 - (ii) during the probationary period, the Employer made the Employee aware of its concerns about his poor performance.
 - (iii) the Employee was given repeated opportunities to improve his performance and received the requisite guidance to perform his duties to the Employer's satisfaction and standard.
 - (iv) the Employee's probation was extended on his request for a further opportunity to bring his performance up to a reasonable standard.
 - (v) the Employee agreed to the extension of his probation for three (3) months.
 - (vi) despite the extension, the Employee's performance did not improve and was unacceptable based on his qualifications and experience.
 - (vii) when the Employer terminated the contract, it was within its right to do so since the Employee was on probation.
 - (viii) further, on November 2, 2016, the Employee was given notice that he would be dismissed if his performance did not meet reasonable standards.
 - (ix) the Employer denies unfairly dismissing the Employee or that he is entitled to compensation.

The Issues

8. The following issues are required to be determined:
- (i) whether the Employer had sufficient factual basis for dismissing the Employee
 - (ii) whether the Employer acted reasonably or unreasonably in dismissing the Employee under the circumstances
 - (iii) whether the Employee contributed to his dismissal

Issue #1: whether the Employer had sufficient factual basis for dismissing the Employee

9. The Vice President of Operations and General Manager, Mr. Alex De Brito, gave evidence that he had prepared two letters before meeting with the Employee on November 2, 2016. One letter was a dismissal letter, and the other is the letter of October 31, 2016, extending the Employee's probation. He also stated that when he

extended the Employee's probation, the Employer had not intended to enter into a new agreement for employment. Additionally, during his oral closing submissions, Learned Counsel, Mr. Marshall, conceded that any contracted provision that falls below the Labor Code's standard is a nullity and agreed that the extension of Employee's probation fell below standard.

10. Notwithstanding Mr. Marshall's concession, having regard to the Antigua and Barbuda Labour (Labour Code), we must consider the Employee's right not to be unfairly dismissed and whether there was sufficient factual basis for the dismissal.
11. Therefore, the first hurdle faced by the Employer is establishing that it had a good cause for the dismissal. Section 58(1) of the Labour Code states:
"A dismissal shall not be unfair if the reason assigned by the employer, therefore-
 - (a) ...;*
 - (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C59 (3) (my emphasis)."*
 - (c) ...;*
 - (d) ...; or*
 - (e) ...;**Provided, however, that there is a factual basis for the assigned reason*
12. Section C59 (1) of the Labour Code provides that an employer may properly dismiss an employee for poor performance. However, in the event, as in this case, the employer determines that the allegations against the employee are not serious enough to warrant dismissal under Section 59 (5), then the employer can issue a warning letter and allow the employee to improve performance. Section C 59 (5) provides as follows:

C59 (5) - "Where an employee is not performing his/her duties in a satisfactory manner the employer may give the employee a warning which shall describe the unsatisfactory employment in respect of which the written warning is given, and state the action the employer intends to take in the event of repetition; and thereafter, if the employee does not, during the period of three months following receipt of the written warning, demonstrate that he is able to perform and had performed his duties in a satisfactory manner, the Employer may terminate the employment of the said Employee."
13. However, the analysis does not end here. Whether or not a dismissal was fair or not is determined based on the test of reasonableness as provided by Section C58(2) of the Labour Code, which reads:

C58 (2)- “The test, generally for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the Employer acted unreasonable or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the Employer, would have reasonably led to the Employee’s dismissal.

14. It is clear from the termination letter and the Employer’s Memorandum that the reason for dismissing the Employee relates to his capability to do or perform the work he was employed to do. Therefore, the Employer’s defence falls under Section C58(1)(b) of the Labour Code.
15. Witness Ms. Pam Constantine, the Financial Director of the Employer, gave evidence that the Employee was required to produce financial statements, conduct reconciliations, and other reports as part of his duties. The financial statements were due monthly for the previous month, and the flash Profit and Loss reports were due on the 8th of each month for distribution to Management and the Directors. Her evidence is that between September and December 2016, the Employee failed:
 - (i) to submit the Flash Profit and Loss for September on time
 - (ii) to update the balance sheet reconciliations for August 2016 month end.
 - (iii) to meet set deadlines to prepare for the arrival of the auditors in November 2016
 - (iv) to meet usual monthly deadlines for November 2016
 - (v) submitted Financial Statements without completion of balance sheet reconciliations and checklist
 - (vi) to reconcile the Employer’s two main bank accounts for two (2) successive months
16. The Employee, during cross-examination, accepted that there were complaints concerning performance every month. However, he stated that his failure to meet deadlines was due to the work environment he inherited. His evidence was that several employees had outstanding grievances that his predecessor, Ms. Constantine, had failed to address. Therefore, he did not get the support of the employees. He denied having shortcomings in the performance of his duties. He contended that the Finance Director’s complaints were based on her personal preference about how assigned tasks were to be carried out.
17. However, the question is whether or not there was sufficient factual basis for the assigned reason for dismissal. The termination letter purports to terminate the Employee during his probation period. However, having heard the evidence at trial, it is apparent that the underlining reason for the termination is related to the Employee’s capabilities and performance.

18. Therefore, without deciding at this stage on whether the factual basis was sufficient to justify the dismissal, we conclude that the documentary evidence, mainly the email exchanges between the Finance Director and the Employee, the witnesses' statements, and the witnesses' oral evidence that there was factual basis for the underlying reason for the dismissal.

Issue #2: whether the Employer acted reasonably or unreasonably?

19. Sections C58 (1) and C59 (5) of the Labour Code require an Employer who finds that an Employee's performance is unsatisfactory to provide a written warning to the Employee, give details of the poor performance, and allow the employee to improve his performance before dismissal.
20. Rawlins J.A. in the case of **Jewellers Warehouse v Cecile Norde', Civil Appeal No 29. Of 2004**, emphasized that a written warning is mandatory if an employer wishes to terminate an employee's employment for poor performance. The learned Justice of Appeal, as he then was, stated as follows:

" When read with section C58(1 (b) of the Code the requirements of section C59(5) are mandatory in that where incapability is given as the basis for termination, the requirements of section C59(5) of the Code must be satisfied if a dismissal for incapability is to be encompassed "within the limitations of section C 59(5)". The written warning must describe the nature of the incapability that is alleged. It must also state the action the Employer intends to take in the event of repetition. The action for which the employee is dismissed must be a repeat of the matter or matters complained of in the warning letter.

21. We must therefore apply sections C58(1) and C59(5) to the facts of this case. There were several emails exchanged between the Employee and the Finance Director. However, after reading and considering the contents of the emails exchanged between September and October 2016, we find that they do not amount to complaints, warnings, or communication describing the Employee's unsatisfactory performance. Instead, the emails offered guidance to the Employee and showed the Director's comments and recommendations.
22. Then there is the correspondence of October 31, 2016, which states that the Employer provided the Employee with an opportunity to meet its standards and expectations for his position as Hotel Accountant. However, the letter must be taken at face value in that it was a letter extending the probation of the Employee. In any event, even if we were to accept Learned Counsel, Mr. Marshall's submission that it was a warning letter concerning poor performance, it still fell short of the requirements set out in C59(3) in that it:

- (i) did not describe the unsatisfactory performance
- (ii) did not state the intended action to be taken by the Employer in the event of repetition or continuation of poor performance

23. The nature of the reasonableness test as required under C58(2) was considered by the Barbados Court of Appeal in **David Lashley & Partners Inc v Bayley (1992) WIR** and was determined to be a subjective one. Accordingly, the test stated in that case is as follows:

“If an employee is dismissed because of his incapability, the correct test to apply is whether the Employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the Employer to prove that the Employee was incompetent... In other words, the test...is a subjective one...it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent”.

24. As set out in the dismissal letter dated January 9, 2017, the reason for the termination relates to capability and performance. While we find that there exist facts to potentially support the Employer’s case that it acted reasonably in dismissing the Employee, the requirements under section C 59(5) must be satisfied. This Court, in the case of **Glendora Burns v Chase Distributors Limited Reference No 27 of 2014** referencing the **Jewellers Warehouse** judgment, stated, **“whatever the formulation of the reason for the dismissal, this Court cannot make a finding that good cause existed under C58(1)(b) unless it falls within the limitations of section C59(5)”.**

25. Learned Counsel for the Employer submitted that the Employee was terminated per the Fixed Term Contract. The contract provided for termination at will and without cause by either party upon sixty (60) days’ notice to the other.

26. However, we are reminded that Section C56 of the Labour Code provides that termination of an Employee must be for cause. Termination at will or without cause falls below the standards of the Labour Code. Therefore, the requirements of Section C59 (5) must be satisfied. Accordingly, the Employer, having failed to warn the Employee that termination was likely and having failed to allow him the period to improve, has unfairly dismissed the Employee.

Issue# 3: did the Employee contribute to his termination?

27. Based on the Employer’s attempt to extend the probation, the Employee knew that the Employer was dissatisfied with his performance by the end of the meeting on November 2, 2016. The Employee under cross-examination acknowledged that he

was aware that he would be dismissed if his performance had not improved during the ensuing three (3) months.

28. The evidence shows that the Finance Director complained about the Employee's ability to produce timely financial reports and checklists, complete the necessary financial statements without errors, complete the bank reconciliations and update the journals of the Employer.
29. The unchallenged evidence is that the Finance Director met with the Employee in November 2016 to reinforce the training she had given the Employee in August 2016 and address matters previously discussed in some emails. The Employer's evidence is that despite these reinforcements, the Employee in December 2016 distributed Financial Statements for November 2016 without completing bank reconciliations, particularly the Employer's primary bank account.
30. The Finance Director communicated her concerns in several email correspondence on November 22, 2016, December 6, 2016, December 1, 2016, and January 1, 2017. However, the emails to the Employee post-November 2, 2016, did not amount to warnings or communication describing the Employee's unsatisfactory performance.
31. Nonetheless, we note that the Employee repeatedly accepted, acknowledged these errors and failures, and took responsibility in each instance. We, therefore, find that the Employee contributed to his dismissal, and thus his compensation, will be subject to a reduction.
32. We, therefore, assess compensation due to him as follows:
 - (i) **Notice Pay:**
Based on the terms of the fixed-term contract, the Employee is entitled to compensation equivalent to two month's pay of USD\$8,000.00.
 - (ii) **Loss of earnings:**
The Employer paid the Employee until the end of January 2017. By email correspondence dated the 10th and 11th January 2017, post-termination, the Employee advised the Employer that he had received an offer with another company as Financial Controller. In his supplemental Witness Statement, the Employee provided evidence that between February 2017 until August 2018, he earned EC\$8,500.00 or USD 3,161. 96 per month, a reduction in his monthly earnings by USD\$838.03. He is therefore entitled to the sum of USD\$15,922.57 from February 2017- August 2018.

(iii) **Vacation pay:**

As per the termination letter, the Employee received his accrued vacation under the fixed term contract. No evidence was provided to dispute this and as such no award is made.

(iv) **Fringe Benefits:**

The Employee was entitled to be paid a bonus subject to conditions stipulated under the contract. On the face of it, the Employee did not work long enough to meet these conditions. In any event, there was no evidence presented to suggest that the Employee would have met the requirements to receive a bonus or the circumstances would have permitted the Employer to be able to pay a bonus. As such, no award is made regarding bonuses.

(v) **Exemplary damages:**

The evidence does not support an award being made under this head.

(vi) **Manner of dismissal:**

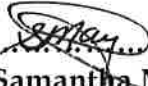
The court finds no evidence that the Employee was dismissed in a manner that affected his ability to get employment. As a matter of fact, he secured another job within days of his dismissal.

(vii) **Costs:**

The evidence does not present any exceptional reason to make an award under this head.

33. We have therefore assessed compensation to the Employee in the sum of **USD\$23,922.57**. In addition, we have assessed the Employee's contribution to his dismissal at 20%. As a result, we reduce the compensation assessed above by that percentage to **USD\$19,138.00**.

Dated this ^{9th} day of March, 2021


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Samantha May-Francis
Chairman

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St. Lawrence Defreitas
Member


.....
Megan Samuel-Fields
Member

