

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/1 of 2020

BETWEEN:

SUNDRY WORKERS (JAMAL CHARLES AND ALEXANDER BRIGHT)

Employee

and

ANJO WHOLESALE LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice President

The Hon. Judith Dublin

Member

Appearances:

Mr. Ralph Potter of Antigua & Barbuda Trade and Labour Union, Representative for the Employees

Mrs. Denise Parillon of Jonas Parillon & Co., Attorneys-at-Law for the Employer

2021: November 18 / 2022: March 03 / 2023: May 12

Collective Agreement providing for probation period and rates of pay - Employees subjected to probation upon transfer to new positions after 6 and 18 years of employment - whether probation periods valid and enforceable - Employees paid at rates of pay inconsistent with rates stipulated in the Agreement - whether Employees entitled to the stipulated rates higher than the rates previously earned in their former positions.

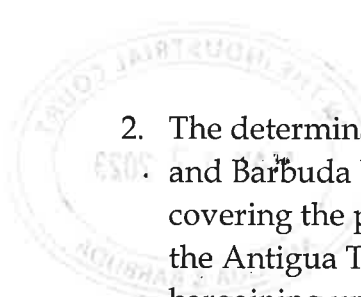
JUDGMENT

Brown, P:

Introduction

1. As expressed by the Employees, the main issues arising in this reference are "unlawful probation" and "incorrect rate of pay". Those issues arise from the course of conduct between the parties culminating in a) the transfer of the Employees, with their concurrence, from their previous positions of General Helper and Delivery Driver, respectively to those of Merchandisers.



- 
2. The determination of those issues turns largely on the provisions of the Antigua and Barbuda Labour Code and the Collective Agreement dated July 14, 2017 covering the period January 2017 to December 2019 between the Employer and the Antigua Trades and Labour Union, the trade union representing the bargaining unit within which the Employees fell.
 3. The Employer is incorporated under the Laws of Antigua and Barbuda with its principal place of business situate at American Road in St. John, Antigua. It is well established in the business of the wholesale importation, distribution and sale of beverages and health care products.
 4. The Employees commenced their employment with the Employer in May 2012 and January 2000, respectively. In June and April 2018, they were transferred from their previous positions to those of Merchandisers.

Discussion

Probation

5. Mr. Charles' transfer was communicated by letter dated July 24, 2018 whereby it was stated to take effect from June 25, 2018. This occurred after he had served the Employer for approximately 6 years in the position of General Helper. His transfer was stated to be on condition that he successfully completes a three-month probation period.
6. In the case of Mr. Bright, his transfer was communicated by letter dated April 10, 2018 and stated to take effect from April 09, 2018. This occurred after he had served the Employer for over 18 years during which he held the positions of General Helper, Merchandiser and Delivery Driver. Since he previously worked as Merchandiser for approximately 5 years, his transfer was categorized by the Employer as a "reinstatement" to his former position.
7. By letter dated April 26, 2018, the First Employee was informed that he had successfully completed his "probation period that was extended by a month to September 25, 2018." On the other hand, by letter dated July 16, 2018 the Second Employee was informed that he had successfully completed his "probation that was extended by a month to September 10, 2018."
8. As averred in its amended Memorandum of Defence, the Employer took the position that "the 2018 probation periods of both Employees were trial periods to assess whether they could be confirmed as Merchandisers or whether they

would have to be returned to their previous positions, and the company contends that these periods were not unlawful.”

9. As to probation, section C 8 of the Labour Code provides:

“

1. A new employee’s probation period may not exceed 3 months duration, unless there is provision for greater period in a collective agreement between an employer and a registered trade union acting as a sole bargaining agent for all employees in an appropriate bargaining unit.
2. During his probation period, an employee shall be given reasonable training in the duties of the position for which he was hired, and shall be kept informed of his progress.
3. During his probation period, an employee’s employment may be determined without any reason being given except an infringement of his self-organizational rights as set forth in Part 1 of Division K.”

10. In similar terms, Clause 8 of the Collective Agreement provides:

“

- a) The probation period for any employee shall not exceed (3) months, during which time the employment may be terminated by either party with an advance notice of at least twenty-four (24) hours.
- b) During his/her probation period, an employee shall be given reasonable training in the duties of the position for which he/she was hired, and shall be kept informed of his/her progress.
- c) Notwithstanding (a) above, in the event where Management needs to further assess the performance of a new employee, the probation period may be extended by another four (4) weeks maximum by mutual agreement.
- d) Upon successful completion of his/her probation the employee shall be informed in writing by management. ”

11. It appears that the parties to the Collective Agreement did not address their minds to the question of the requirement for a “probation” period upon the transfer of an employee from one position or department to another. In any event

there is no such agreed term or condition in the Collective Agreement. To the extent that the Employer was desirous of introducing a probation period or transfer, this situation leaves an obvious lacuna.

12. In the circumstances, given the nature and the systematic arrangement of the Labour Code, in the absence of any provision therein for a probation period applicable to any employee other than a "new" employee, we are constrained to conclude that the periods of "probation" applied to the Employee upon their transfers were unenforceable as such.
13. At paragraph 6 (b) of their Memorandum of Claim the Employees prayed for "a declaration as to whether a current employee of a workplace can be placed on probation when promoted or transferred to a new position." Having considered the law, the evidence and the closing submissions of Counsel and the Representative of the Employees, we will grant the prayer for that relief.
- 14. In the premises, we declare that on a true construction of section C 8 of the Labour Code as a whole, and the meaning of probation and any extensions thereof. as provided in that section, any action by an employer to fix probation periods for workers other than "new employees" at the commencement of their employment, is ultra vires and unenforceable.**
- 15. Further, for the avoidance of doubt, we declare that by reason of the provisions of section C 8 of the Labour Code as reinforced by the terms and conditions agreed under Clause 7 of the Collective Agreement, the probation periods unilaterally imposed by the Employer upon the respective transfer and reinstatement of the Employees are null and void.**

Rates of Pay

16. As to the dispute over rates of pay, it is noteworthy that in their Amended Memorandum of Claim filed on January 12, 2022, the Employees claim the sums of \$2,864.52 and \$3,772.28 respectively as their agreed monthly rates of pay, as shown in fifth column of Schedule 1 to the Collective Agreement under the heading "3rd year, 1/1/19 + 2%". Needless to say, their contention is that at the date of transfer and reinstatement in 2018 their rates of pay should have been \$2,806.51 and \$3,698.32 respectively.
17. The resolution of this issue turns largely on our interpretation of the Schedule referred to in Clause 22 of the Agreement under the heading "Remuneration". It may be useful to note our observation that the layout of the salary scales in the

Schedule is somewhat amorphous. For present purposes, it will suffice to state some of our observations below.

18. There is an "Entry Rate" stated in the first row for each category of workers. In each category there is a relatively wide gap between the Entry Rates and the successive rates. In the case of Merchandisers, the Entry Rate is \$2,000.00 per month, but there is no nexus with the succeeding three entries. Logically, this could mean that the parties intended this rate to apply to new hires employed by the Employer for the first time as Merchandisers. Further, that result would mean that an employee who commenced his or her employment in 2017, at entry level, would have been paid only \$2,000.00 per month. Thus, there should have been agreed salary rates for the succeeding years 2018 and 2019 for the same employee who commenced at the entry level in 2017. The Schedule has no such rates. The nexus between the Entry Rate and the other rates is conspicuously absent in all the categories of workers.
19. Secondly, the rates in the various columns seem to have been calculated in linear manner from left to right, from year to year. This means that there is no discretion on the part of the Employer. In the case of Merchandisers, three fixed rates are given, into one of which each Merchandiser falls. There is obviously no band or range of rates for any of the categories within which a particular worker could fall. It would probably be helpful if ranges or bands are established for each category, and if the categories are subdivided into sub-categories. Thus, it might be useful to have different grades of Merchandisers, say, Merchandiser: Grade 1, Grade 2, Grade 3 and so on with a range of salary for each Grade. Clearly, such a structure would leave room for the Employer to exercise its inherent discretion as to what point within a particular range each Merchandiser should fall. Needless to say, the exercise of the Employer's discretion as to the rate of pay within a particular sub-category would turn on objective criteria such as qualifications, experience, competence, performance and so on.
20. In fact, based on the evidence and the submissions of Counsel, it appears that the stipulated categorization and rates of pay might have been agreed on the basis of the number of employees in the particular positions at the time of the negotiations. In particular, it appears that there were only three Merchandisers at the date of the Collective Agreement, none of which were at Entry Level. As a result. The salaries might have been negotiated primarily on the basis of what they were in the previous year. Thus, it is not surprising that the instant dispute has arisen. If similar disputes have not yet materialized, it is more than likely that some will arise in the near future.

21. In relation to the categories other than Merchandisers, it may very well be true that at the material times there was a team Warehouse Staff comprised of 8 workers, each of which had a specific rate of pay above the entry rate. At the same time, it appears that there were only two Sales Representatives with rates of pay significantly higher than the Entry Rate. In our view, the layout and usefulness of the Schedule could be enhanced significantly if the various categories of workers were divided into sub-categories with a specific range of salary for each one. Thus, to expand the idea stated above, we give an example of the sub-categories and ranges of salary in relation to Merchandisers:

(1) Trainee Merchandiser- (Range of Entry Rate)	\$2,000 - \$2,500.00
(2) Merchandiser - Grade 1	2,500 - 3,500.00
(3) Merchandiser - Grade 2	3,500- 4,500.00
(4) Merchandiser - Grade 3	4,500 - 5,500.00
(5) Merchandiser - Grade 4	5,500 - 6,500.00

22. We do not think it necessary to go into more detail in relation to the possible improvement to the layout and usefulness of the Schedule. Suffice it to say, in its present form, it is pregnant with potential disputes and limits the exercise of the Employer's discretion, if any, to a bare minimum. In other words, it is riddled with much potential for uncertainty, ambiguity and confusion, as in the instant dispute, which may remain suspended for the time being, but are likely to crystalize sooner or later.

23. Having commented on the amorphous nature of Schedule, we will refocus on the claim made by the Employees in this Reference. It is instructive to note that in his Supplemental Witness Statement Mr. Winter, the Employer's General Manager, indicated that the Employer was prepared to adjust the wages for the First Employee "retroactively from the date of his transfer in 2018 to \$2,806.57." In the circumstances, we understand that concession to mean that the rate at which the First Employee should be paid retroactively is the lowest rate stipulated in the Schedule for 2018. Accordingly, given its preset structure, the First Employee became entitled to the stipulated rate of \$2,862.64 in the "third year" 2019. And he is entitled to receive all retroactive payments on those bases.

24. As to the Second Employee, it is noteworthy that his transfer amounted to a reinstatement. His overall tenure of service at the date of trial exceeded 18 years; of which he previously served as a Merchandiser for approximately 5 years. The evidence is that at the date of his transfer in 2018 he was earning \$2,825.00 while the First Employees earned \$2,315.00

25. In considering a reasonable increase for the Second Employee, we will use the Employer's concession to pay the First Employee \$2,806.51, an increase of approximately \$500.00, as the starting point. Given the Second Employee's much longer tenure and his previous experience as a Merchandiser and higher wages; it is not unreasonable to increase his salary by the same or a similar amount. There is no doubt that Second Employee should be paid a higher salary than that of the First Employee. The next rate stipulated in the Collective Agreement for 2018 is \$3,698.32, a significant increase of over \$800.00. Taking all the evidence into consideration, it is our opinion that Second Employee's increase should be limited to the same or a similar amount as that which the First Employee received, which amount we fix at \$500.00.
26. In making our order below on the foregoing bases, we are mindful of the Employer's position that the adjustments would mean that the Employees could earn salaries higher than the amounts paid to other higher-level employees and other experienced and competent Merchandisers who they met in the position. Further, we are mindful of Mr. Winter's unchallenged assertion the "Salary scales in the Collective Agreement do not reflect the wages of actual Merchandisers of the company, and that is a problem". Perhaps, most instructively on this point, we note that on the Employer work sheets for the various categories of workers, provisions appear to have been made for negotiations for the salaries of 9 Merchandisers, three times more than the number in the Collective Agreement now under consideration.
27. In the final analysis, in our view, there is a lot of work to be done towards better rationalization of the categories of workers listed in the Schedule, so that negotiations and final agreements are not pursued solely on the basis of current rates for individual workers. The categories and the corresponding rates of pay stated in future agreements should be based on an objective assessment of the various categories with distinguishing levels of seniority and ranges or bands of salary. The foregoing suggested approach should allow for less ambiguity and uncertainty and allow for the better exercise of the Employer's discretion from time to time. Ultimately, with the participation of experienced and competent negotiators on both sides, the number of disputes, if any, over salary should be kept to a bare minimum.
28. For completeness, we note that during the trial, the Court, on its own volition, was inclined to seek to assistance from Mr. Hugh Joseph, an experienced Trade Unionist with over 19 years' experience in negotiating collective agreements. He was deemed to be an expert and testified accordingly at our request. However, in

light of Counsel's strong objection, we have wholly refrained from relying on or referring to his testimony or any part of it.

29. In the premises, in resolving the second main issue, we order as follows:

- (1) The rate of salary to which the First Employee, Jamal Charles, is entitled upon his transfer to the position of Merchandiser with effect from July 24, 2018, be and is hereby fixed at \$2,806.51 per month.**
- (2) The Employer do calculate and pay to the First Employee outstanding retroactive salary based on (a) the said rate of \$2,806.51 for 2018, (b) the rate of \$2,862. 64 for 2019, and (c) any subsequent agreed increase up to the date of this Order, no later than June 30, 2023.**
- (3) The Employer do calculate and pay to the First Employee all additional bonuses, allowances and other entitlements, if any, resulting from subparagraphs (1) and (2) above, no later than June 30, 2023.**
- (4) The rate of salary to which the Second Employee, Alexander Bright, is entitled upon his transfer to the position of Merchandiser with effect from July 24, 2018, be and is hereby fixed at \$3,325.00 per month.**
- (5) The Employer do calculate and pay to the Second Employee outstanding retroactive salary based on (a) the said rate of \$3,325.00 for 2018, (b) the rate of \$3,391.50 for 2019, and (c) any subsequent agreed increase up to the date of this Order, no later than June 30, 2023.**
- (6) The Employer do calculate and pay to the Second Employee all additional bonuses, allowances and other entitlements, if any, resulting from subparagraphs (4) and (5) above, no later than June 30, 2023.**
- (7) There shall be no order as to costs.**

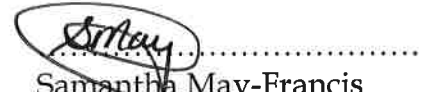
30. Finally, in so far as this judgment results in anomalies arising from the terms of the Collective Agreement, the parties are at liberty to endeavour to resolve them amicably. All such efforts to resolve existing differences and to negotiate the agreements going forward must have particular regard for the terms and

conditions expressly agreed in the "Scope" of the Agreement and the rights of the parties as expressed in Clauses 1 and 2 thereof.

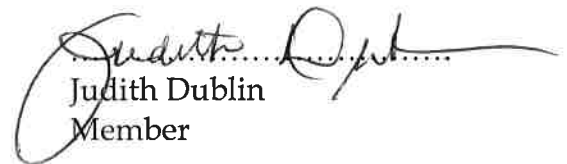
Dated this 12th day of May 2023



Charlesworth O.D. Brown
President



Samantha May-Francis
Vice President



Judith Dublin
Member

