

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/11 of 2020

BETWEEN:

NICOLE WHITE

Employee

and

ANJO WHOLESALE LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Judith Dublin

Member

The Hon. Collin R. Maynard

Member

Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee

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

2023: May 2 / 12

Collective Agreement providing for "normal hours of work": Monday through Friday and overtime pay at "double (2) times the basic rate on Saturdays" – Employer and Employee entering into individual contract requiring the Employee to work "a flexible work week" – whether the Employer entitled to schedule the Employee to work on Saturdays as part of flexible work weeks - whether Employee entitled to overtime pay for work done on Saturdays

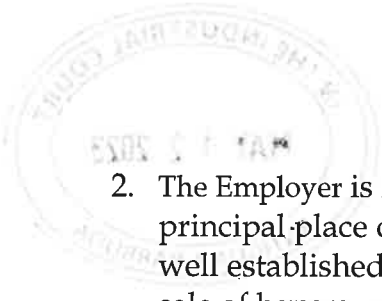
JUDGMENT

Brown, P:

The Factual Matrix

1. The following factual matrix was largely determined at trial after careful consideration of the written, oral and documentary evidence. At the trial the Employee testified on her own behalf while Mr. Clement Winter and Mr. Rolston Roberts, the Employer's General Manager and former Human Resources Manager respectively, testified on behalf of the Employer. The Employer closed its case without the benefit of evidence from Ms. Peach Hodge, the Employer's former Sales Manager, who was listed as a witness but did not attend the trial.



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2. 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. For the purpose of advancing its business and meeting the needs of their customers, it employs merchandisers who are deployed to their premises from time to time on duty to assist with the promotion, display and marketing of selected products.
 3. The Employee was employed by the Employer as a "Sales Merchandiser" between July 2, 2018 and June 14, 2019 when she was dismissed. Her last salary was \$2,040.00 per month.
 4. The employment relationship was largely governed by a subsisting Collective Agreement between the Employer and the Antigua Trade and Labour Union in its capacity as the bargaining agent representing members of the pertinent bargaining unit of employees employed by the Employer. Clause 4 of that Agreement provides that "the normal hours of work for the employees at Anjo Wholesale, with the exception of the Cleaner, shall be Monday through Friday: 8:00am-4:30pm with one hour lunch."
 5. Given the provisions of the Antigua and Barbuda Labour Code and the subsisting Collective Agreement, particular terms and conditions of the Employee's employment were stated in the Employer's letter dated July 2, 2018. In that letter, the Employer asserted that "A flexible work week will be assigned to you by your manager or supervisor for a five-day week from 8:00am- 4:30pm with one hour for lunch."
 6. Clause 5 of the Collective Agreement provides for the payment of overtime at the rate of "Double (2) times the basic rate on Saturdays for the first four (4) hours, and 2 ½ times thereafter".
 7. Prior to the employment of the Employee, Casime Mapp employed as a Merchandiser. Some of his duties were performed on Saturdays at Epicurean Supermarket. As a result of his absences from time to time on Saturdays, the Employer determined that the Employee would fill in for him.
 8. It was explained and brought home to the Employee that although Saturdays and Sundays were her normal days off, she would be "called out" and required to work on Saturdays whenever Mr. Mapp was absent. Accordingly, during the course of her employment the "flexible work week" which the Employee was required to work was limited to those days when Mr. Mapp was absent.

9. In recognition of the standard five-day work week the Employer formed the habit of giving the Employee a "day off" in the week following her "call out" on a Saturday from time to time.
10. From time to time, the Employee worked her regular work week plus the following Saturday. As a result of the practice adopted by the Employer, the Employee was not paid any overtime or premium pay as stipulated under Clause 5 of the Collective Agreement.
11. During the course of her employment the Employee became dissatisfied with the practice adopted by the Employer. In particular, in reliance on the assertions of Sales Manager, her direct supervisor, the Employee was dissatisfied that she had not been receiving any pay for the work she did on Saturdays.
12. The opposing positions taken by the Employer and the Employee resulted in a grievance situation in which the Union became involved at the request of the Employee. Notwithstanding the involvement of the Union, the grievance remained unresolved.
13. Sometime in 2019 following the discipline of another employee who was largely engaged to do the "Saturday work" the Employer proposed that the Employee be "scheduled" to work on Saturdays on a more regular basis. The Employee refused and as a result of which a stalemate ensued with the Employer, on the one hand maintaining that is was entitled to schedule the Employee to work on Saturdays as part of her regular work week. While the Employer on the other hand maintained that she was only obligated to work Monday to Fridays and entitled to enjoy Saturdays as her day off, on which latter days she was not compelled to work but would be entitled to receive overtime/ premium pay from time to time if she agreed to do so.
14. The impasse was never resolved. Ultimately, the Employer dismissed the Employee on June 14, 2019 on the grounds that, in breach of the agreed condition that she was required to work a "flexible work week", she refused to work on weekends.
15. By these proceedings, commenced on January 24, 2020, The Employee raised the issues of "Unfair Dismissal" and "Retroactive Salary/Benefits". We will resolve both issues in sequence below.

Discussion

Whether the Employee was unfairly dismissed

16. Given the statutory genesis of the Employee's right not to be unfairly dismissed, the evidentiary burden of proving that a dismissal was not unfair rests squarely on the Employer. Based on its evidence and the submissions of its Counsel, it appears that they were misguided as to the nature, content and effect of the Collective Agreement. That situation apparently stemmed from a fundamental misunderstanding of the minimum standards established by the Labour Code and the sacred role of trade unions in negotiating binding agreements with more advantageous working conditions.
17. Thus any condition set out in the letter of employment which falls below the minimum conditions set out in the Labour Code and / or the agreed more advantageous conditions set out in the Collective Agreement, are liable to be struck out or rendered void. Accordingly, in the face of Clauses 4 and 5 of the Collective Agreement, the Employer cannot maintain that a "flexible work-week" could properly be interpreted to mean anything contrary to that Clause. In other words, the Employer could not intentionally schedule the Employee to work on a Saturday or a Sunday as part of "the normal hours of work".
18. By extension, the Employee or any other worker employed by the Employer, is entitled to receive the contractual premium / overtime pay in accordance with Clause 5 of the Collective Agreement.
19. Further, in the absence of any express agreement with the Union or an individual employee, the Employer's practice of "giving" an employee a day-off during the ensuing work-week after she had worked on the previous Saturday is unreasonable, unfair and unenforceable.
20. It cannot be over-emphasized that the determination of whether or not a dismissal is unfair requires the application of provisions of section C 58 of the Labour Code. Firstly, under sub-section C 58 (1) in order to discharge its evidentiary burden, the Employer must first meet the threshold of establishing the factual basis for its reason for dismissing the Employee. In our opinion, given the foregoing facts, there is and could be no or no good factual basis for the reason assigned. Without a sound factual basis, the reason assigned is wholly invalid.
21. In any event, notwithstanding the reason the Employer assigned for the dismissal, we are obligated to apply the critical test of reasonableness under section C58 (2). The test is: whether the Employer acted reasonably or unreasonably under the circumstances when it dismissed the Employee.
22. The Employer's unreasonableness is manifest in its response to the "grievance", as precipitated by the Employee's refusal to work on Saturdays without being

paid at the premium rate, and which grievance was canvassed by the Union on her behalf and on behalf of others in the bargaining unit. The evidence of the Employee, which we wholly accept, is that the Employer's Sales Manager, Ms. Hodge, supported the Employee's position. In the circumstances, the Employer's intransigence was a clear element of unreasonableness. It simply refused to budge towards further negotiations and ultimately towards a fair resolution of the grievance.

23. In our estimation, reasonableness was crying out for the Employer to revisit and reassess its position vis-a-vis that of the Union and the Employee in respect of "a flexible work week" in the context of the provisions of Clauses 4 and 5 of the Collective Agreement. The Employer's misguided approach and its Counsel's reliance on section J 13 in her submission as to the meaning and effect of a "benefitting employee", were unfortunate. It is pellucid that that definition is limited to the question of the payment of the negotiating fee under the subsection within which it occurs. In accordance with section C 7 (c), it does affect the employee's right to working conditions which do not fall below those established by the Collective Agreement. Thus, in so far as the clause for a "flexible work week" in the Employee's individual contract seeks to establish a condition which conflicts with the Collective Agreement to the Employee's disadvantage, it is null and void.
24. The Employer's flawed approach resulted in another glaring aspect of unreasonableness on its part. Its assertion that the Employee was not entitled to benefit from Clauses 4 and 5 of the Collective Agreement because she was not a member of the Union and had not yet been employed when it was negotiated are illogical and unreasonable.
- 25. In the final analysis, after our careful consideration of the evidence and the opposing closing submissions, we conclude and declare that the Employee was unfairly dismissed and is entitled to compensation which we assess as follows:**

Whether the Employee is entitled to retroactive salary / benefits

26. The provisions for probation and remuneration under Clause 7 and 22 respectively of the Collective Agreement were recently considered by this Court in **Reference No. C/1 of 2020: Sundry Workers v Anjo Wholesale Ltd.** Suffice it to say, as noted in that Reference, those provisions are somewhat amorphous. As a result, we are left to do the best we can to apply those provisions having regard to the relevant sections of the Labour Code and the principles and practices of good industrial relations.

27. As to the salary scales under Clause 22 of the Agreement, the pay stipulated for an employee at "entry level" is \$2,000.00 per month. We interpret this to mean that, although the Employer was entitled to impose the probation period, \$2,000.00 is the minimum amount to which a new hire holding the position of Merchandiser, is entitled. Further, taking into account the term of employment for review of her salary after probation and, the evidence before us discloses that the rate of pay should have been increased upwards from the entry rate of \$2,000.00. Having regard to the increase of \$240.00 actually paid, and the rate of \$2,738.06 stipulated in the Schedule to the Collective Agreement, we would limit her rate after probation to \$2,400.00 an increase of \$400.00 above the Entry Rate.

Compensation

28. By reason of matters aforesaid, we award compensation as follows:

- a. Notice Pay
\$2,400.00, the equivalent to one month salary as fixed by the Court.
- b. Loss of Protection
\$2,400.00, the equivalent to one month pay.
- c. Outstanding Salary
 - i. **\$600.00**, the difference in pay for 3 months during the probation period $[(2000-1800) \times 3]$
 - ii. **\$3,060.00**, the difference between \$2,400.00, as fixed by the Court, and \$2,040.00 actually paid, for 8.5 months between October 1, 2018 to June 14, 2019 (360×8.5)
- d. Overtime Pay
\$443.08, the equivalent to 4 days overtime pay for work done on Saturdays at the daily rate of \$110.77 $\{[(2,400 \times 12) / 52] / 5\}$
- e. Immediate Loss
\$7,200.00, the equivalent to 3 months' pay at the fixed monthly rate of \$2,400.00
- f. Fringe Benefits
\$2,145.00, the equivalent of three months' travelling allowance at the rate of \$715.00 per month.

g. Exemplary Damages

\$7,500.00, by reason of the blatant breach of the Collective Agreement, the disregard for good industrial relations practices and the overall unduly harsh and oppressive nature of the dismissal.

h. Costs

\$1,500.00, on account of the exceptional reasons disclosed at trial which underpin the award of exemplary damages.

Order

29. Having regard to the payments of \$1,129.80 and \$2,040.00 to the Employee as severance pay and notice pay, we order as follows:

The Employer shall pay the net sum of \$24,078.28 - inclusive of retroactive pay, compensation and costs - to the Employee in respect of her unfair dismissal, no later than June 15, 2023.

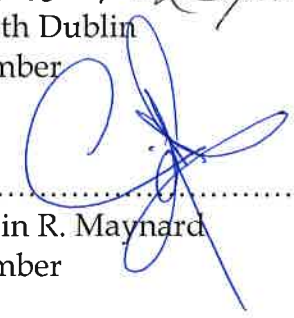
Dated this 12th day of May 2023



Charlesworth O.D. Brown
President



Judith Dublin
Member



Collin R. Maynard
Member

