

ANTIGUA & BARBUDA

REFERENCE NO. 12 OF 2018 BETWEEN

IN THE INDUSTRIAL COURT



DEBBY LOOBY

Employee

And

CENTRAL MARKETING CORPORATION

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Judith Dublin

Member

Appearances:

Ms. Debby Looby, appearing in person

Mr. Peyton Knight of Peyton Knight and Associates, Attorneys-at-Law for the
Employee

2021: November 24

2023: April 21

JUDGMENT

May-Francis, VP

Background

1. The Employer is a body corporate established by the Central Marketing Act Cap 81 of the Laws of Antigua and Barbuda (the Act). As provided by the Act, its mandate is to stimulate, facilitate and improve the production, marketing and processing of agricultural produce in Antigua and Barbuda. The Employer also helps to develop programs to secure favourable arrangements for the purchase, handling, distribution, transportation, storage, processing, marketing and sales of produce locally and regionally.

2. On March 15, 2001, the Employee commenced employment as a “Project Development Officer” for a fixed term of two (2) years in accordance with a proposed fixed term contract delivered to her on April 24, 2001 by Mr. Clarence Edwards, the former General Manager. She earned a monthly salary of \$4,500.00 and a transportation allowance of \$500.00.
3. The employment relationship between the parties lasted for ten (10) weeks until May 24, 2001, when the Employee was dismissed for reason that the Employer no longer desired to execute an employment contract with the Employee or to continue the employment relationship.

The Proceedings

4. By Reference filed on March 12, 2018, the Employee claims that she was unfairly dismissed. In her Memorandum, she claims that the draft contract given to her by Mr. Edwards contained unfavourable terms and conditions different to those she had agreed to before she commenced working. It was for these reasons she refused to sign the contract. While she awaited the amended contract without warning, the Employer dismissed her.
5. The Employer admits that it dismissed the Employee but contends that it had the right to do so based on Section C8 (3) of the Antigua and Barbuda Labour Code (the Labour Code) which permits an employer to terminate an employee during his/her probation without any reason being given. Consequently, the Employer’s position is that the Employee was not unfairly dismissed.
6. On February 22, 2021, in reliance on the doctrine of Laches, the Employer filed an Application to strike out the Employee’s Reference pursuant to Part 36 of the Industrial Court Rules. The matter came up for hearing on May 13, 2021, and this Court, on July 27, 2021, dismissed the Employer's Application for several reasons and determined that the applicability of the equitable doctrine of Laches would be considered at trial after inquiry of the circumstances which caused the delay.

Equitable Principles

7. Recently, this Court was asked to consider the equitable principle of Laches as a Defence in **Andre Thomas v Mill Reef Club Reference 21 of 2011**. It was determined that the equitable doctrine of Laches “**fall squarely under the umbrella**” of this Court’s duty to act in accordance with equity as provided by Section 10(3) of the Industrial Court Act.
8. In **Andre Thomas**, the Employee filed his Reference 13 years after the dismissal. In its consideration of the Defence of Laches, this Court adopted a broad approach

and inquired into the circumstances which caused the delay. As President Brown stated, the Employee in the **Andre Thomas** case: “**provided reasonable explanation and excuse for the obvious delay**”.

9. Based on her evidence, the Employee in this Reference met with the then Minister after the dismissal. Within months of her dismissal, she spoke to Mr. Chester Hughes at the Antigua & Barbuda Workers Union. Her evidence is that Mr. Hughes advised her of her rights in August 2001 and the next steps she should take. The Employee filed her Reference eighteen (18) years after being advised by the Union. When asked why it took her eighteen (18) plus years to file her Reference, the Employee offered no viable reason for the delay.
10. It is noteworthy that while the Employee says that the events which took place remain fresh in her mind, in our opinion, the delay prejudiced the Employer as the Employer’s witnesses’ evidence, in our view, appeared distorted due to loss of memory resulting from the passage of time. Applying the approach in the **Andre Thomas** case and having inquired into the circumstances which caused this rather lengthy delay of more than eighteen (18) years and after careful consideration, the Employee provided no reasonable explanation or excuse for the delay. Accordingly, we accept the Employer’s Defence of Laches and the Employee’s Reference is barred by Laches.
11. Given the opposing positions of the Parties, if we are wrong in our finding that the Employee’s Reference is barred by Laches, the issue remaining for consideration is whether or not, in the circumstances, the Employee was unfairly dismissed.

Resolving the Issue

Whether the Employee was unfairly dismissed

12. During the trial of this matter, the evidence differed regarding with whom the Employee negotiated the terms of employment. On the one hand, the Employee gave evidence that she negotiated with Mr. Vere Bird Jr., the then Minister of Agriculture. On the other hand, the Employer contends that the negotiations took place between the Employee and Mr. Edwards. Irrespective of whom the Employee negotiated with, the evidence clearly shows that the Employee was employed pending the finalization of the contract.
13. The Employee contended that the proposed contract contained terms different from those she had agreed to. She communicated this to the Employer and, at the very least, expected a discussion about the terms of the contract. Instead, on May 24, 2001, she received a dismissal letter advising that the Employer did not wish to sign a contract of employment with her and that her employment was being terminated immediately.

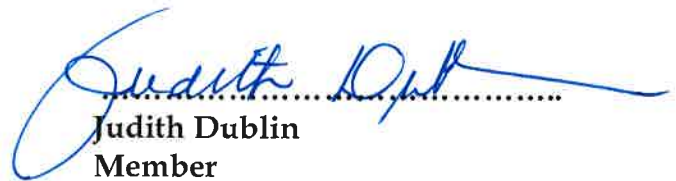
14. The Employee gave evidence of the several terms she alleges differed from those agreed to orally. However, based on her evidence and submissions, the issues of probation and gratuity were her main contentions. The draft contract contained a probation period of six (6) months, and it did not provide a gratuity to be paid to the Employee. The Employee's position was that before commencing work, she had agreed to three (3) months' probation, which is in keeping with Section C8 of the Labour Code. Mr. Eden Weston, former Chairman of the Board of the Employer, gave evidence on behalf of the Employer that the Employer's standard probation period was three (3) months and that the six (6) months stipulated in the contract was an error.
15. Notwithstanding the Employer's evidence and concession that the six (6) months' probation falls below the standard of the Labour Code, we must highlight the provisions of Section C5 of the Labour Code, which provides that, within ten (10) days of employing a person, the Employer must give to that individual a written statement that sets out his/her general responsibilities and related duties; the regular hours of work and rest periods; the starting pay and the method for calculating it; the length of the employment, if it is not indefinite; the period of probation, if necessary; the employee's leave and vacation privileges and the employee's obligations concerning trade unions.
16. Section C5 of the Labour Code requires that an employee receives the particulars regarding the employment relationship within ten (10) days after starting work. In practice, this is generally done in the form of a letter of appointment or contract of employment. Additionally, this is imperative to avoid misunderstandings and conflicts related to an employee's engagement. In the absence of compliance with Section C5, we could not deduce the precise terms and conditions governing the employment relationship between the parties.
17. Nonetheless, having heard the oral testimony of the witnesses, mainly that of the Employee, we accept that a three (3) month probation was agreed upon. Therefore, at all times, her employment was subject to her successfully completing probation. The Employee, however, maintained that her dismissal was unfair as the Employer failed to adhere to the provisions of Section C8 (2) of the Labour Code, which provides:
- "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".*
18. The Employee's evidence and submission in support of her contention are conflicted. On the one hand, she contends that she needed training; on the other, she states that she did not need to be trained in the execution of her duties. The Labour Code explicitly states that an employer may decide not to retain an

employee during a probation period and dismiss that employee without reason once notice is provided. Section 8 (3) provides:

"During his probation period, an employee's employment may be terminated without any reason being given except in infringement of his self-organizational rights as set forth in Part I of Division K."

19. In the dismissal letter, we note that the Employer states, *"... the Corporation does not wish to proceed to sign a contract of employment with you at this time. Thus, your employment with the Corporation is deemed to have ended this day."*
20. Based on the provisions of the Labour Code, the Employer is free to terminate the contract of employment during probation without disclosing any particular reason but merely coming to the conclusion that it did not wish to continue the employment relationship. Therefore, in the final analysis, the Employee, having accepted that her probationary period was three (3) months, we find that the Employer dismissed the Employee within her probationary period. However, the Employer failed to give the Employee the requisite notice or pay in lieu of notice provided by the Labour Code. Nonetheless, this on its own does not render the dismissal unfair.
21. For the above reasons, we wholly reject the Employee's Reference that she was unfairly dismissed. Accordingly, her Reference is hereby dismissed.


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Samantha May-Francis
Vice President


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Judith Dublin
Member

