



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/14 of 2018

BETWEEN:

KENNY JACKSON

Employee

and

**IAIN SHARP
SUSAN SHARP
CASA DE SOGNI D'ORO LTD**

Employers

Before:

The Hon. Samantha May-Francis

Vice President

The Hon. Judith Dublin

Member

The Hon. Collin R. Maynard

Member

Appearances:

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

Mrs. Nelleen Rogers Murdoch of Simon Rogers Murdoch, for the Employers

2022: November 21

2023: March 17

JUDGMENT

May-Francis, VP:

BACKGROUND

1. The Employee, by Reference filed on March 19, 2018, commenced a claim for unfair dismissal against the Employers herein named. At all material times, the

first and second named Employers were Directors of the third named Employer. The third named Employer is a duly registered company in Antigua and Barbuda.

2. At all material times, the Employee was employed as a Gardener at the residential property known as La Casa located on Long Island, also known as Jumby Bay, which is situated just off the northern-eastern coast of the mainland Antigua.
3. The Employee commenced working on July 16, 2008, under a contract of employment with the third named Employer and was earning \$1,485.26 fortnightly.
4. On December 7, 2016, the Employee was given a dismissal letter, effectively ending his employment. The Employee, therefore, claims unfair dismissal and fair compensation.

PRELIMINARY APPLICATIONS

5. Learned Counsel Mrs. Nelleen Rogers Murdoch, on behalf of the Employers, made an application for the removal of the third named Employer as a party to this Reference. Mr. Carty, the Employee's Representative, made an application for judgment to be entered on liability against the Employers pursuant to Section C10(4) of the Antigua and Barbuda Labour Code (the Labour Code).

Application in relation to the removal of third named Employer

6. The Employee filed his Reference naming all three parties as the 'Employer'. Learned Counsel submitted that the third named Employer should be removed as a party to the Reference. She contended that the second and third named Employers, who were the Directors and Shareholders of the third named Employer, had sold their shares and were no longer Directors of the Company. Additionally, Learned Counsel relied on the Employee's witness statement in which he stated that his employers were the first and second named Employers and argued the Employee himself acknowledged that the first and second named Employers employed him.

7. Mr. Carty opposed the Employers' application for the removal of the third named Employer and contended that the third named Employer should remain as a party to this Reference. He directed the Court to the Employers' Memorandum filed on April 19, 2018, which stated that the third named Employer had engaged the Employee and that the first and second Employers acted in their capacity as Directors. Additionally, he submitted that the Employers were in breach of Section C5 of the Labour Code in failing to provide the Employee with a written statement of his working conditions. Finally, he contended that had the Employers done so, there would be no question about who should be the proper parties to this Reference.
8. Having carefully considered the parties submissions, we determined that despite the first and second named Defendants having sold their shares and were no longer Directors of the Company, all of which took place after the dismissal of the Employee, the third named Defendant ought to remain as a party to this Reference. In arriving at our position, we considered the documentary evidence, which on its face suggests that the Employee was contracted by the third named Employer; the Employers' Memorandum and the third named Employer's admission that it employed the Employee; the legal principle that a duly registered company has separate legal personality; and the absence of evidence of any successor arrangement protecting the third named Employer from liability in relation to matters which preceded the first and second named Defendants' sale of their shares.
9. It is noteworthy that Learned Counsel Mrs. Rogers Murdoch made no Application to remove the first and second named Defendants as parties to this Reference. As a matter of fact, by their submissions, the first and second named Employers consented to be named parties to this Reference. As such, we determined that the matter should proceed against all three named Employers.

Application Pursuant to Section C10 (4) of the Labour Code

10. The Employers, in this case, though they filed their Memorandum on April 19, 2018, failed to file any witness statements. The Employers contended that despite their failure, they are still entitled to participate in the trial and to test the evidence of the Employee.

11. Mr. Carty, on the other hand, argued that the Employers' failure to provide the precise reason for the dismissal means they were estopped from adducing evidence at trial regarding any such reason. He relied on Section C10 (4) of the Labour Code, which reads:

"An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate in any proceeding testing the fairness of the dismissal or his liability for severance whichever is applicable".

12. We reminded ourselves of the decision of **Berridge & Others v Benjies Centre (Antigua and Barbuda) Privy Council Appeal No 51 of 1995**, in which Lord Hoffman stated, **"...the purpose of Section C10 is not merely to ensure that an employee is given reasons for the termination of his employment. It requires those giving the reasons to be given in a form which can be readily identified for the purposes of any subsequent proceedings "testing the fairness of the dismissal". The reason why they need to be capable of identification as formal statutory reasons is that in such proceedings, the employer is "conclusively bound" by the statutory reasons (subsection (3)) but not by any other reasons which he may have given. Likewise he is estopped by subsection (4) from introducing testimony of facts which could have been included in the statutory reasons."**

13. Therefore, based on the decision of **Berridge** and the overarching statutory provisions of Section C10(4), we agreed with Mr. Carty's submission that the dismissal letter did not meet the statutory requirements of Section C10(4). As such, the consequence is that the Employers were estopped from introducing testimony at trial as to the precise reason for the dismissal.

14. Nonetheless, the Employers advanced a defence that the Employee is not entitled to any compensation, having already received fair compensation. It is, therefore, clear that the Employers continued to be interested in the matter. Accordingly, the Employers are entitled to participate in the assessment.

15. Our finding and the Employers' admission of liability resulted in us entering judgment on liability jointly and severally against the Employers for unfair dismissal. The Court then proceeded to deal with the assessment of compensation due to the Employee.

DISCUSSION

16. Despite the Employee receiving \$29,385.56, Mr. Carty submitted that he should be compensated further. He argued that the dismissal was sudden and unexpected. Further, the Employers breached Section C58 of the Labour Code as they had no good cause for the dismissal. Additionally, the Employers compounded their breach by failing to furnish the Employee with a statement setting out the precise reason for his termination. Mr. Carty argued that in these circumstances, the Employee is entitled to further compensation and has asked this Court to make an award as follows:
- i. Loss of protection calculated at 20 days per year instead of one day for every month worked. He is seeking the difference between the two.
 - ii. Immediate loss of income for two (2) years as the Employee, despite his best efforts, was unable to find work and remains unemployed up to the date of trial.
 - iii. Future loss of six (6) months as the Employee has still not found work
 - iv. Exemplary damages of \$20,000.00
 - v. Cost of \$2,500.00
17. The Employers took issue with the Employee's submission for further compensation. Learned Counsel Mrs. Rogers Murdoch argued that this Court's decisions have a precedent-setting impact. Therefore, regard must be given to the principles of equity, good conscience, the interest of justice and the community as a whole. Learned Counsel argued that the Employee already received \$29,385.56 and should, therefore, not receive any further payments as to do so would result in the Employee being compensated in excess of the statutory requirements and would not be in the public interest.
18. We considered the spirited submissions of both parties and emphasise that the assessment will be based on our determination of the facts, on the written and oral testimony of the parties, as well as supporting documentary evidence

having regard to the principles of equity, good conscience and in the interest of justice.

COMPENSATION

19. The dismissal being unfair, the issue remaining for consideration by this Court is the amount of compensation to be paid to the Employee.
20. The dismissal letter did not provide a breakdown of the sum of \$29,385.56 which was paid to the Employee but provided that the payment represented outstanding wages from November 28 to December 7, 2016, two weeks' pay in lieu of notice, severance, and an ex gratia payment of 4 months.
21. For the purpose of the assessment, we needed to determine the monetary sum for each head referred to by the Employer in the dismissal letter and endeavoured to do so. Accordingly, the Employee earned \$1,485.26 per fortnight, and assuming that he worked five (5) days per week, we have calculated the \$29,385.56 paid by the Employer under the various heads stipulated in the dismissal letter as follows:

Outstanding wages (\$148.53 x 10 days)	\$ 1,485.26
Severance (\$148,53 x 101 days)	\$15,001.53
Notice Pay	\$ 1,485.26
Ex gratia payment	\$11,413.51

22. We have carefully considered the sums already paid by the Employers to the Employers, including the gratuitous payment which falls short of the four (4) months the Employers contend they paid. Notably, any award we now make will be subject to the payments already made by the Employers and received by the Employee. Furthermore, there being no evidence of the Employee being part of a Bargaining Unit, the terms and conditions of the Employee's engagement was exclusively subject to the standards in the Labour Code.

23. Accordingly, we considered the following established heads:

Outstanding wages

- (a) The Employers acknowledged that the Employee was due nine (9) days' wages from November 28th to December 6th 2016, and agreed to pay the Employee for December 7th, the effective date of his dismissal, a total of ten (10) days. Assuming the Employee worked a five (5) day work week, the Employee's daily rate would be \$148.53. **We, therefore, award the sum \$1,485.26 (\$148.53 x 10 days).**

Loss of Protection

- (b) This is similar to severance pay. Section C41 of the Labour Code provides the minimum rate of one day's pay at the employee's basic wage for each month or a major fraction of his term of employment with his employer. This Court's settled practice is to award monthly paid workers at the rate of one month's pay for a year of service. Additionally, this Court, based on the facts and circumstances of the case, has awarded compensation for loss of protection to fortnightly paid workers using a monthly rate. Having regard to the facts of this case and the circumstances, in our opinion, an award should be made at the rate of 20 days per month, as submitted by Mr. Carty. The Employee worked from July 16, 2008, to December 7, 2016, i.e. approximately eight (8) years. Using a daily rate of \$148.53, **we, therefore, award the sum of \$23,764.80 (\$148.53 x 20 days x 8 years).**

Notice Pay

- (c) The Employee is entitled to notice pay equivalent to his periodic pay. Accordingly, the Employee was paid fortnightly. **We, therefore, award the sum of \$1,485.26.**

Immediate Loss

- (d) The Employee gave evidence of his attempts to find work to mitigate his loss. His evidence is that he applied to several business places, some of which

called him for an interview. However, he was not hired, and by April 2017, he purchased a weed whacker and started doing jobs cutting grass. He earned approximately \$250.00 per week from grass cutting. He continued to cut grass until October 2017, when he gained part-time employment earning \$300.00 weekly. After that, he had several short-term job opportunities in various sectors, including trucking and construction.

We are satisfied that the Employee, immediately after his dismissal, was diligent in his efforts to find a job. **We, therefore, award him four months' salary in the sum of \$12,872.25 (\$3,218.06 x 4).**

Future Loss

- (e) The Employee's evidence at trial was that he was unemployed. Therefore, he is seeking compensation for future loss, which is usually granted when it is anticipated that an employee will not attain his previous level of earnings until sometime in the future after the trial of the matter.

We considered the level of wages the Employee earned, the skillsets he possesses, the length of time since his dismissal and the fact that he has had a series of jobs since the dismissal. In our view, the Employee, based on his skillsets, should by now be in a position to earn wages at the level he earned before his dismissal. Therefore, based on the evidence, we are not satisfied that the Employee was unemployed at the date of trial because the Employers had dismissed him in 2016. As such, we make no award under this head.

Manner of Dismissal

- (f) The Employee gave evidence that he had secured several interviews. However, he was not hired on account of this matter remaining outstanding. This, in our view, does not meet the standards and underpinning principles to make an award under this head. Furthermore, there is no evidence to suggest that the Employers did anything to cause the Employee's reputation to be damaged, thereby affecting his prospects of securing employment. We, therefore, make no award under this head.

Exemplary Damages

- (g) Section 10 (5) of the Industrial Court Act provides that the Court may award exemplary damages in circumstances where “an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice”.

In his submission for an award for exemplary damages, Mr. Carty argued that the Employers:

- summarily dismissed the Employee without any prior warning that they were dissatisfied with his conduct or disciplinary action against him;
- did not provide the Employee with the precise reasons for his termination; and
- disregarded the principles of good industrial relation practices in adopting “a deep pocket approach”. Having unfairly dismissed the Employee and then attempted to alleviate their wrongdoing by offering him some compensation.

Having considered the evidence, it is unclear whether the Employers genuinely desired to offer the Employee a gratuitous payment or whether it was an attempt to compensate the Employee based on their appreciation of the risk and their potential exposure to a claim for unfair dismissal.

Whatever the Employers’ reasons, after careful consideration of all the facts and evidence, we find that in certain important aspects, the Employee’s evidence supports a finding that his dismissal was harsh and oppressive.

We, therefore, award exemplary damages of \$5,000.00.

Costs

- (h) **Section 10(2) of the Industrial Court Act** provides for costs to be awarded only where exceptional reasons exist. Mr. Carty argued that the facts and circumstances of this case constitute “exceptional circumstances” and submitted that an order for cost should be awarded to the Employee. Learned Counsel Mrs. Rogers Murdoch vehemently opposed an award for costs. However, in our final analysis, we consider it proper to award costs; **therefore, we award the sum of \$1,500.00.**

AWARD

24. The Employee is entitled to compensation of **\$46,107.57** broken down as follows:

Outstanding wages	\$ 1,485.26
Loss of Protection	\$ 23,764.80
Notice Pay	\$ 1,485.26
Immediate loss	\$ 12,872.25
Exemplary damages	\$ 5,000.00
Costs	\$ 1,500.00

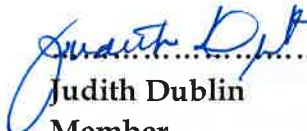
ORDER

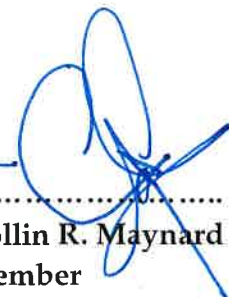
25. We order that:

- (1) The Employee is entitled to overall compensation of **\$46,107.57**, which shall be offset against the sum of \$29,385.56 previously paid by the Employers, leaving a net sum of \$16,722.01 due and owing to the Employee.
- (2) Accordingly, the Employers shall pay the sum of **\$16,722.01** on or before April 17, 2023.

Dated this 17th day of March, 2023


.....
Samantha May-Francis
Vice-President


.....
Judith Dublin
Member


.....
Collin R. Maynard
Member