

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/25 of 2017

BETWEEN:

KADEEM FREELAND

Employee

and

PATRICK COLBOURNE t/a TIME RITE BAKERY

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John H. R. Benjamin

Member

The Hon. Collin Maynard

Member

Appearances:

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

Mrs. Eunica Anthony-Victor of Anthony Victor Legal Services, Attorneys-at-Law for the Employer

2023: March 16

2023: March 24

JUDGMENT

Brown, P:

Factual Background

1. At all material times, the Employer was engaged in a small business of preparing and selling bread and other baked products from his premises situate at Bendals Main Road, in the Parish of St. John in Antigua.
2. The Employee commenced his employment in July 2008, as a Baker's Assistant. As at August 9, 2016, he was earning weekly wages of \$365.00 for a 4 day work-week. On that date, there were three other employees at work in the business, including the Employee's younger brother Jallel, whose duty was mainly to run the oven. Based on the training they received from the Employer, the Employees

were competent to perform different tasks from time to time as the need arose in order to ensure the timely delivery of the products to the general public.

3. On Tuesday, August 9, 2016, the Employee was on duty when his brother reported to the Employer that he was feeling ill and that his doctor had advised him to stay away from the oven. As a result, the Employer instructed the Employee to run the oven in his stead.
4. The Employee initially refused to comply but said nothing to the Employer. About half an hour later, the Employer noticed that he was sitting on the steps to the premises and enquired as to why he was not doing as he was told. In response, the Employee expressed his refusal to comply whereupon the Employer told the Employee that he should either comply immediately or go home. The Employee elected to go home.
5. The Employee stayed away from work on that day and the following day which was his day-off. He returned to work on Thursday, August 11, 2016 and was confronted by the Employer as to why he was on the premises. Eventually, he told the Employer to leave his premises. The Employee complied and thenceforth formed the view that he had been dismissed.
6. The Employee commenced these proceedings claiming that (a) he was unfairly dismissed on August 11, 2016; and (b) he is entitled to unpaid vacation benefits. The Employer disputed the claim on the ground that the Employee had abandoned his job on August 9, when he elected to go home rather than comply with his instruction.

Discussion

7. It is not in dispute that, in breach of Section C 9 of the Labour Code, the Employer failed to issue a written statement of the Employee's working conditions. In particular, the Employer did not provide the Employee with a written statement of his "general responsibilities and related duties" for which he was employed, and his "leave and vacation privileges".
8. As to the allegation of job abandonment, it is generally accepted that any such conduct by an employee is a means by which an employment relationship may be terminated. However, it cannot be over emphasized that reasonableness on the part of the Employer, in coming to that conclusion, is paramount. As stated by **Sir John Donaldson in Harrison v George Wimpey and Co Ltd (1972) 7 IT 188**: "Where an employee so conducts himself as to lead a reasonable employee to believe that the employee has terminated the contract, the contract is then terminated".

9. In the absence of the required statement of responsibilities and duties, there was uncertainty as to whether the Employer's instructions to operate the oven was reasonable. In the circumstances, it is safe to conclude that the Employer's ultimatum that the Employee run the oven or go home without more, was unreasonable. In any event, the ultimatum to go home was vague and ambiguous. Was it to be interpreted as a period of indefinite suspension, and if so, with or without pay? Or, was it intended to be a dismissal contingent upon the Employee's refusal to comply with the instruction to run the oven?
10. In the circumstances, the mere existence of the ambiguity favours the Employee. On our analysis of the situation, it appears obvious that the Employee accepted the contingent disciplinary action not as one of dismissal but one of suspension for a day. We are confident in the conclusion because the Employee returned to work on the August 11, 2016, immediately after his scheduled day-off in accordance with the work roster created by the Employer.
11. In our opinion, the Employer's breach of his statutory duty at the commencement of the employment relationship and the inherent unreasonableness of the ambiguous ultimatum given on August 9, 2016 were exacerbated by his reaction to the Employee's presence at the workplace on August 11, 2016.
12. In our opinion, contrary to the Employer's position, the Employee had not abandoned his job. Further, it is also clear that he had not formed the view that he had been dismissed. Thus, his handling of the situation with which he was confronted when the Employee turned out to work, was crucial. It appears that, rather than being more circumspect, engaging in introspection and proceeding cautiously, his reaction amounted to continuing or renewed unreasonableness.
13. In any event, asserting that the Employee had abandoned his job and demanding that he leave the premises were unmistakable elements of unreasonableness. At the very least, the situation required the Employer to engage in dialogue with the Employee and assert his position in writing with respect to (a) the Employee's duties and responsibilities (b) the Employer's intention when he issued the contingent ultimatum; (c) a warning as to the likely consequence of his failure to comply with the same or similar reasonable instructions in the future.
14. In the circumstances, it was reasonable for the Employee to conclude that the employment relationship had been terminated and that he had no choice but to leave the premises as demanded by the Employer. Moreover, the potentially

good reason for dismissing the Employee for insubordination or refusal to comply with the Employer's reasonable order was wholly undermined and nullified by the Employer's unreasonableness.

15. In the premises, we declare that (a) the Employee did not abandon his job on August 9, 2016 as contended by the Employer; and (b) the Employee was constructively and unfairly dismissed on August 11, 2016.
16. Given our declaration of unfair dismissal, it follows that the Employee is entitled to compensation, the assessment of which turns on our consideration of the evidence before us. Firstly, we are obligated to consider whether or not the Employee contributed to his dismissal. In that regard, we accept the Employer's evidence that he personally trained the Employee "in all areas of baking including the use of the ovens". Moreover, we find that by August 9, 2016 he was competent to work as a baker and had previously done so from time to time.
17. Further, in the circumstances then prevailing, having particular regard to the illness of his brother Jallel, the Employee fully appreciated that his operation of the oven was critical to the business. According to the Employer, the Employee gave him no reason for refusing to run the oven, he just walked away "leaving ... a great strain on my business". The effect of the Employee's departure was such that the Employer had to personally jump in to assist the other two workers with the baking. Overall, the Employee's conduct relative to that of the Employer, was more calculated and divisive.
18. In conclusion on this aspect, we find that the Employee is blameworthy. And we fix his contribution to his dismissal at 25%, by which percentage his assessed compensation package will be reduced.
19. In assessing the compensation to which the Employee is entitled, we must also consider whether he discharged his obligation to mitigate his loss. Overall, as his own witness, he was not convincing. We are not satisfied that he did as much as he should have done to find alternative employment.

Compensation

20. By reason of matters aforesaid, we award compensation to the Employee as follows under the respective headings:
 - a. Pay in Lieu of Vacation

Contrary to the Employee's assertion that he received an annual bonus, the Employer maintained that such amounts were annual payments in

lieu of vacation. To the contrary, the Employer's witness, Tamica Antonio testified that the payment she and other workers received was annual 'severance' pay. The Employer produced no record of these payments.

In the absence of any documentary evidence and in light of the Employer's conflicting evidence, we find that the Employee benefitted only on two occasions (in 2012 and 2014) from his annual entitlement to vacation of 12 days. Accordingly, we award the sum of **\$6,570.00**, as pay in lieu of vacation for 6 years.

b. Notice Pay

We award the sum of **\$365.00**, the equivalent of his weekly wages.

c. Loss of Protection

Based on his tenure of 94 months, we award the sum of **\$8,577.50**, being the equivalent of one day's pay for each month worked.

d. Immediate Loss

e.

Given the limited extent of his efforts to mitigate his loss, we limit our award of compensation under this heading to **\$4,745.00** the equivalent of 13 weeks wages.

21. We reduce the total amount of compensation awarded above under items b to d in the sum of **\$13,687.50** by 25% on account of the Employee's contribution to his dismissal.

Order

22. And order that the Employer do pay the net sum of **\$16,835.63** to the Employee by two (2) installments as follows:

- a) **\$10,000.00** on or before April 28, 2023
- b) the balance of **\$6,835.63** on or before May 31, 2023

Dated this 24th day of March 2023



Charlesworth O.D. Brown
President



John H. R. Benjamin
Member



Collin Maynard
Member

