

ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMEBER

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/28 of 2020

BETWEEN:

N'KOSI WILLIAMS

Employee

and

AMERICAN UNIVERSITY OF ANTIGUA COLLEGE OF MEDICINE

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John H.R. Benjamin

Member

The Hon. Collin R. Maynard

Member

Appearances:

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

Dr. L. Errol Cort of Cort & Cort, Attorneys-at-Law for the Employer

2023: May 10 / 26

Occupational injury resulting in absence of Grounds-man on certified sick leave for 265 days over an eighteen month period - Medical doctor certifying Employee unfit for manual work - Employer offering alternative employment as a Security Officer - Employee rejecting offer and demanding pay-off - Employer dismissing Employee without severance pay - whether dismissal unfair.

Collective Agreement providing for grievance procedure - Employee selecting Representative other than one from the Union - Employer insisting on agreed procedure and engaging with Representative by an exchange of letters - whether Employer committed infringement of Employee's self-organizational rights.

JUDGMENT

Brown, P:

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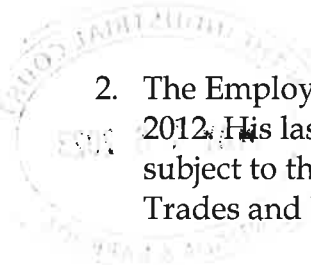
JUDGMENT

Brown, P:

Background

1. In this Reference, filed on April 29, 2020, the Employee contends that he was unfairly dismissed and that his self-organizational rights were infringed by the Employer which carries on the business of providing medical education to its students from its premises situate at Jabberwock Beach Road, Coolidge, Antigua.



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2. The Employee commenced his employment as a "Grounds Man" on June 01, 2012. His last salary was \$2,941.62 per month. The employment relationship was subject to the Collective Agreement between the Employer and the Antigua Trades and Labour Union.
 3. On October 13, 2017, while performing his duties the Employee sustained personal injuries when a thorn from a date palm tree pierced his left wrist. Thereafter, treating the matter as an instance of "occupational injury". the Employer met all expenses associated with his medical attention and care
 4. Upon the Employer's instructions, the Employee consulted with Consultant Orthopedic Surgeon Dr. Deepraj Gaekwad from the period February 2018 to March 2019, during which period several sick leave certificates were issued. Ultimately, the Consultant Surgeon concluded and reported to the Employer that the injury rendered the Employee unfit to continue to function of a Grounds Man. He recommended that less strenuous duties be assigned to him. To that end he stated:
"... it is recommended that Mr. Williams should avoid and discontinue any labor-intensive occupation and an alternative occupation not requiring heavy lifting and impact to the upper limbs be sought."
 5. In an effort to abide by the Consultant's opinion and comply with his recommendation, the Employer offered the Employee an alternate position in the Security Department, but the Employee declined the offer and stated his preference to be "paid off".
 6. Negotiations between the parties ensued, during which the Employee was represented by Mr. Anderson Carty an official of the Antigua & Barbuda Tradesmen & United Workers' Federation. During the course of the negotiations the Employee formed the view that his self- organizational rights were being infringed. After negotiations towards a mutually agreed position proved unsuccessful, the Employer dismissed the Employee.

Discussion

Was there a violation of Employee's self-organizational right?

7. Section J4 of the Labour Code provides:
"Despite the general rule laid down ... any individual employee, or group of employees, or any trade union so requested by an employee in the unit, shall have the right at any time to present grievances to an employer and to have such grievances adjusted, without the intervention of the sole bargaining agent, ...".

8. In its letter to the Employee's Representative dated December 5, 2018, during the course of the negotiations towards a mutually agreed position, the Employer took the position that the Collective Agreement:

"...outlines the procedures that an employee must follow in relation to any grievances regarding his/her employment. In the circumstances, the University has no objection to anyone Mr. Williams would like to have as representation but wishes for him to comply with the Collective Agreement which we are guided by."

9. We note that the Employer acknowledged the Employee's choice of representative and engaged in a robust exchange of letters with him. By our count, between November 2018 and May 2019, no less 10 letters passed between them towards a resolution of the grievance.
10. After careful consideration of this issue we have concluded that there is no or no sufficient evidence before us on the basis of which we could be convinced that the Employee's self-organizational rights had been infringed. To the contrary, the Employee's notion of any infringement appears to have been fueled by personality differences and the obvious zeal with which both the Employer's Human Resources Coordinator and the Employee's Representative interacted with each other.

Was the Employee unfairly dismissed?

11. It is not in dispute that the Employee was absent due to illness for a total of 265 days over a period of 18 months between October 2017 and March 2019. Given that fact, and armed with Dr. Gaekwad's reports, the Employer was in a good position to terminate the employment under section C 16 (2) the Labour Code. That subsection, if properly invoked, would have imposed no obligation on the Employer except for the payment of severance pay. As it turned out, the Employer wittingly or unwittingly avoided the payment of severance pay under that subsection and thereby exposed itself to the instant claim of unfair dismissal.
12. In the circumstances, having particular regard to his settled position as Grounds Man and the recommendations of Dr. Gaekwad, it was reasonable for the Employee to reject the position of Security Officer and suggest that he be paid off instead. In our opinion, when faced with the choice, the Employer erred in its response when it failed or refused to issue the payoff and doubled down on its position that the Employee should accept the alternative position.
13. In the four-page letter of dismissal dated March 18, 2019, the Employer bemoaned the Employee's failure or refusal to respond to its offer within the stipulated time. In the opening paragraph, the Employer stated:

"I refer to the correspondence issued to you dated November 22, 2018 and February 07, 2019 regarding a proposed alternative employment offer in an effort to continue your employments with the University. You were asked to give a written response within the specified timelines indicated, however to date we have received no response from you as to whether you would accept or decline the proposed offer."

14. In the penultimate paragraph of page 3 of the letter, the Employer further stated:

"In the circumstance, the University is forced to consider the termination of your employment due to your inability to perform the work for which you were employer having regards to your incapacity and, you are not willing to accept the alternative employment offer made to you in an effort to continue your employment. Your employment with the University is therefore terminated with effect from March 18, 2019. Your termination is without prejudice to you filing a claim for compensation under the Workman's Compensation Act".

15. In our estimation, it is clear that the Employer identified incapacity a valid reason, with a sound factual basis, for the dismissal of the Employee. However, it was unreasonable to connect that reason with the Employee's unwillingness to accept the alternative employment, as though they were inextricably linked.

16. It is noteworthy that under cover of its letter dated March 22, 2019, four days after the dismissal, the Employer paid the sum of \$16,914.32 to the Employee as his severance entitlement. This payment evidences the Employer's belated acknowledgement of its obligation which might have crystallized earlier but for its unreasonable stance when it took the decision to terminate the employment relationship.

17. Thus, ruling out the application of section C 16 (2), in terms of the statutory provisions of section C 58, we conclude that although it discharged its evidentiary burden of proving that it had a good factual basis for the assigned reason of incapacity or inability under subsection (1), the Employer failed the test of reasonableness as established by subsection (2). And, given the conjoint effect of both subsections, the conclusion of unfair dismissal is inevitable.

18. Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation which we assess as follows:

Compensation

19. We award compensation under the respective headings as follows:

a. Notice Pay

Payment in the sum of **\$6,049.33** representing payment under this heading plus payment in lieu of vacation was offered to and accepted by the Employee

b. Loss of Protection

Payment in the sum of **\$16,914.32** under this heading was offered to and accepted by the Employee

c. Immediate Loss

We award the sum of **\$17,649.72**, being the equivalent of the employee's salary for 6 months immediately after his dismissal.

d. Exemplary Damages

We award the sum of **\$10,000.00** by reason of the harsh and oppressive nature of the dismissal and the Employer's disregard for provisions of the Labour Code and the principles and practices of good industrial relations.

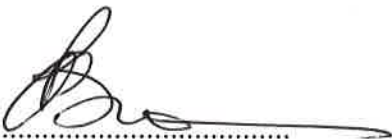
e. Costs

We award the sum of **\$1500.00** on account of the exceptional reasons disclosed at trial.

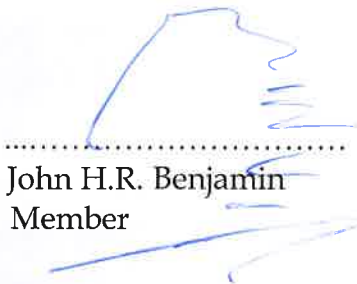
Order

20. In the premises, we order that the Employer shall pay the total sum of \$29,149.72 to the Employee, as compensation for his unfair dismissal and costs, no later than June 30, 2023.

Dated this 26th day of May 2023



Charlesworth O.D. Brown
President



John H.R. Benjamin
Member



Colin R. Maynard
Member

