

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/30 of 2022

BETWEEN:

SHANAE MARKLAND

Employee

and

RASTAPASTA LTD

Employer

Before:

The Hon. Samantha May- Francis

Vice President

Appearances:

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

Mr. Kendrickson Kentish of Lake, Kentish & Bennett, Attorneys-at-Law for the Employer

2023: July 13, 21

Ex Parte trial- Whether the Employee is entitled to compensation to include loss of contractual wages

.....
JUDGMENT

May-Francis, VP:

Background

1. The Employee, by Reference No.30 of 2022, filed on September 5, 2022, claims that the Employer unfairly dismissed her. She further claims that she is entitled to wages and benefits from the Employer's breach of contract. The Employee sets out her claim in her Memorandum filed on September 5, 2022; her Witness Statement filed on June 12, 2023; and her oral evidence.
2. By Order of the Court dated October 24, 2022, the matter was set for ex parte trial as the Employer failed to file its Memorandum of Defence and Witness Statements. The matter was eventually listed for trial on July 13, 2022. By Application dated July 10, 2023, the Employer conceded that it had unfairly dismissed the Employee and requested that the matter proceed on the assessment of compensation.



3. Accordingly, judgment was entered on liability, and the Court then proceeded to deal with the assessment of compensation due to the Employee.
4. However, before the commencement of the assessment, the Parties, in principle, agreed to compensation for loss of protection, notice pay and vacation pay subject to verification of calculations. The Employer also agreed to reimburse the Employee the work permit application fee. The Parties were ordered to file a Consent Order by July 19, 2023 setting out their consent position but failed to do so.

Issue:

5. Having failed to file the Consent Order, all the usual heads of compensation were open for determination by the Court. Therefore, the only issue is whether the Employer is entitled to compensation.

Resolving the Issue

6. The Employee began working with the Employer in its establishment on December 11, 2018, as a Sales Agent until her dismissal on December 4, 2019. The Employee last earned \$400.00 weekly and worked from Monday to Saturday. Being a national of Jamaica, the Employee held a valid work permit as required by law.
7. The Employee contends she was engaged for a fixed term commencing December 11, 2018, to November 2019 in accordance with the period covered by her Work Permit. She relied on the fact that the Employer signed her Work Permit Application and, in support of her Work Permit renewal in September 2019, had represented on the form that her contract was being renewed. Mr. Carty argued that an employee who requires a work permit ceases automatically to be employed by law upon expiration of his work permit. Hence, the engagement period for an employee who needs a work permit must be for a fixed period as stipulated on a work permit.
8. On the contrary, based on the dismissal letter, the Employer suggests that the Employee was engaged for a fixed period, with the letter stating an end date of December 13, 2019. The dismissal letter reads: "*We wish to inform you that Management has taken the decision not to renew your contract of employment, which concludes on December 13th, 2019.*"
9. The Parties both contend that the Employee's contract was for a fixed term, but their evidence differs as the contract's end date. The Parties' intention must be clearly expressed or implied to be deemed fixed-term employment. Fixed-term contracts are usually identifiable by having a set end date, usually by reference to a specific date or on completion of a given task.
10. The contract of employment in this Reference was entirely oral. Very little documentation was submitted into evidence to determine the terms of the oral

contract. The Employer did not file its Memorandum of Defence, Witness Statement, or exhibits. The Employee's evidence is that her first Work Permit expired in November 2019. She provided no documentary evidence to support her contention. Her evidence is that she applied for the renewal early in September 2019.

11. Notably, the Employee gave evidence that she had no discussion with the Employer concerning whether her employment was fixed when she was first engaged and even after obtaining her second Work Permit.
12. The fact that the Employer signed the application for the Employee to renew her Work Permit in September 2019 and its concession in accepting to reimburse the Employee's Work Permit fees does not amount to an express agreement of fixed-term employment or renewal of an existing fixed-term contract. The obligation rested on the Employee to renew her Work Permit to enable her to continue her employment beyond November 2019. Likewise, the fact the Employer stipulated an end date in the dismissal letter was insufficient to conclude that the agreed term was until December 13, 2019.
13. In the circumstances, there is insufficient evidence of what was agreed to determine that the Employee was engaged on a fixed-term basis. The Court accepted the evidence of the Employee that she was never given a statement of working conditions, and there was no discussion that she was employed on a fixed-term basis. Therefore, the Court had no basis to conclude impliedly or expressly that a fixed-term contract existed.
14. Therefore, the Employee is not entitled to loss of contractual wages as claimed. The Employee was engaged permanently and was legally required to hold a valid Work Permit. The following heads of compensation were considered:

Loss of Protection

- (i) 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. The Employee earned \$400.00 per week and worked six (6) days per week. Her daily rate is \$66.66. The Employee worked for six (6) days short of 1 year. In the circumstances, she is awarded loss of protection of **\$800.00** ($\$66.66 \times 12$).

Immediate Loss

- (ii) Having determined that the Employee was engaged on a permanent basis, she is not entitled to loss of wages from December 2019 – December 2020, as would be awarded in circumstances where an employer has been found to have unfairly terminated an employee whose engagement is subject to a fixed term contract.

Despite the above finding, considering the case facts, the Employee is entitled to immediate loss subject to her efforts to mitigate. There was no evidence presented to indicate the level of qualifications or skills of the Employee. The Employee was employed as a Sales Agent. Her evidence is that she remained unemployed from 2019 to 2022 and relied on her mother and partner to meet her daily needs. She gave evidence that she made several job applications, including applications to a few hotels, a hardware store and a law firm. Eventually, she secured a job as a cleaner in 2022, earning **\$450.00** per week.

Under cross-examination, she accepted that the Covid 19 Pandemic negatively affected the business sector and accepted that the then state of affairs may have contributed significantly to her difficulties finding a job.

Therefore, in the circumstances, I find that an award of three months' **\$5,200.00 wages** ($\$1,733.33 \times 3$) months is reasonable for immediate loss.

Outstanding Vacation

- (iii) The Employee's evidence is that she is owed outstanding vacation. The parties had previously agreed to settle this head but failed to do so. During the assessment, no evidence was given to determine the number of vacation days the Employee is due. In the circumstances, having worked for approximately 12 months, the Employee is awarded twelve (12) days' vacation of **\$800.00** ($\$66.66 \times 12$)

Pay in Lieu of Notice

- (iv) The Employee's pay interval was weekly, so she is entitled to receive one (1) week's pay in lieu of notice of **\$400.00**.

Work Permit Fees

- (v) The law does not obligate employers to pay employees' work permit fees. Therefore, without an agreement for reimbursement, the Employee is not entitled to reimbursement, and I make no award.

Exemplary Damages

- (vi) Section 10 (5) of the Industrial Court Act provides that the Court may award exemplary damages 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." The evidence does not support a finding of exemplary damages.

Costs

- (vii) **Section 10(2) of the Industrial Court Act** provides for costs to be awarded only where exceptional reasons exist. In that regard, the Industrial Court must have regard to the principles and practices of good industrial relations. In this case, we see no exceptional reason to warrant an order for costs.

Award

15. The Employee is entitled to compensation as follows:

- | | |
|--------------------------|-------------|
| (a) Loss of Protection | \$ 800.00 |
| (b) Immediate Loss | \$ 5,200.00 |
| (c) Outstanding vacation | \$ 800.00 |
| (d) Notice Pay | \$ 400.00 |

Order

16. Based on the matters aforesaid, we order as follows:

- (i) The Employer shall pay compensation of **\$7,200.00** to the Employee for her unfair dismissal
- (ii) Payment shall be made no later than August 28, 2023

Dated this 28th day of July 2023


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

