

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/40 of 2022

BETWEEN:

KEVIN CHRISTOPHER

Employee

and

ANTIGUA FISHERIES 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. Trevor Kendall Attorney-at-Law for the Employer

2023: July 18, 21

Ex Parte Trial - Claim for unfair dismissal - Compensation - Whether the Employee is entitled to compensation

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JUDGMENT

May-Francis, VP:

The Claim

1. The Employee, by Reference No. 40 of 2022, filed on September 20, 2022, claims that the Employer unfairly dismissed him. The Employee sets out his claim in his Memorandum filed on September 20, 2022; his Witness Statement filed on June 12, April 03, 2023; and his oral evidence.
2. The Employer failed to file its Memorandum of Defence and Witness Statement. Therefore, by Order of the Court dated November 10, 2022, the Court ordered that the matter be listed for an ex parte trial, which was eventually listed on July 18, 2023. On the date of trial, Learned Counsel, Mr. Trevor Kendall, by oral application, requested to participate in the ex parte trial. The Court granted his oral Application and permitted the cross-examination of the Employee and submissions of Learned



Counsel, Mr. Kendall.

Issues

3. The Employer failed to file its Memorandum and Witness Statement. Additionally, the cross-examination of the witness did not yield any evidence to challenge the Employee's evidence that he was unfairly dismissed. Therefore, the only issue for consideration is whether or not the Employee is entitled to compensation.

Resolving the Issue

4. The Employee gave evidence that he began working with the Employer in its establishment on May 7, 2019, as a Fish Processor/Handy Man. On the date of his dismissal on August 28, 2020, he earned \$367.20 per week.
5. His evidence is that he worked without issues until he was diagnosed with a hernia for which he needed surgery. He constantly updated the Employer at the end of each doctor's visit. He also informed the Employer of the difficulty he was experiencing in having the surgery done at the Sir Lester Bird Mount St. John's Centre (the Hospital) due to Covid 19 pandemic. The Hospital had cancelled all surgical operations which were not considered an emergency. As a result, there were times when he was unable to work and would therefore provide certified sick certificates from his medical doctor covering his period of illness.
6. The Employee further gave evidence that on August 27, 2020, he was issued a dismissal letter which reads:
"Due to your illness and your constant complaining of pains which makes you unable to carry out your duties as a Fish Processor/Handyman, the Company has decided to terminate your services effective Friday 28th August, 2020."
7. The Employee stated that his dismissal came as a shock as he was performing all duties assigned to him at the time of the dismissal. His evidence is that his Supervisor, Mr. Shaw being, aware of his illness, had restricted him from shoveling ice and had assigned him the duties of scaling fish which he performed without issues while he awaited surgery.
8. During cross-examination, the Employee gave evidence that he had intermittently taken time off of work due to illness. His evidence is that he had submitted a few sick certificates. He accepted under cross-examination that he did not provide any medical report but stated that the Employer never requested one. His evidence is that before discovering he had a hernia, his Supervisor told him to go to a doctor to check himself out after feeling a sharp pain while lifting some fish-pot wires.

Subsequently, he reported to his Supervisor that he had been diagnosed with a hernia.

9. Mr. Kendall submitted that the Employee never provided the Employer with a medical report. He simply presented sick certificates, which provided no information regarding his diagnosis and prognosis.
10. Mr. Carty, on the other submitted that the burden ought not to be placed on the Employee. He argued that good industrial relation practices require an Employer, in the circumstances such as this, to refer the Employee to a medical doctor to establish the nature of his illness and the prognosis. He submitted that a hernia did not render the Employee unfit to carry out his duties.
11. From the dismissal letter, it is clear that by August 27, 2022, the Employer had formed the opinion that the Employee was no longer fit to continue in employment and therefore dismissed him.
12. Notably, Section C16 (ii) of the Antigua and Barbuda Labour Code (the Labour Code) empowers the Employer to bring an employee's employment to an end, having formed that opinion based on the extent of the leave taken by the Employee. This is different to the situation provided for in Section C16 (iii), where the Employee makes an application to be severed for illness or incapacity to perform his duties.
13. The Employee in this Reference made no application pursuant to C16 (iii). Based on Learned Counsel's submission, the Employer appeared to rely on Section C16 (ii). However, due to its failure to file its Memorandum of Defence and Witness statement, the Employer missed the opportunity to put before the Court evidence of the extent of the leave taken by the Employee. Additionally, there was no evidence to suggest that the Employee had failed to comply with the provisions of Section 16 (i) of the Labour Code.
14. Based on the documentary evidence, the Employee was paid the sum of \$1,552.81, broken down as follows:

(a) Severance Pay (15 days @\$73.44 per day)	\$1,101.60
(b) One (1) weeks' notice pay	\$ 367.20
(c) 3.75 vacation days from May 2020 to August 2020	\$ 275.40
(d) Total Gross Pay	\$1,744.20
(e) Less Social Security	(\$ 100.29)
(f) Less Medical Benefit	(\$ 61.04)
(g) Less Education Levy	(\$ 30.06)
(h) Net Pay	<u>\$ 1,552.81</u>

15. Notwithstanding, Mr. Carty argued that the Employee is entitled to further compensation for immediate loss, manner of dismissal, exemplary damages and costs. We, therefore, considered the following heads of compensation:

(i) **Immediate Loss**

The Employee's evidence is that following his dismissal though he continued to experience difficulties with his medical condition, he could use his weedwhacker to cut grass which he started immediately after being dismissed. He gave evidence, however, that he could not rake and had to hire someone to carry out that function. His proof is that he earned \$800.00 per week, but during the dry season, he earned between \$300.00-\$400.00 every two weeks every other week. He gave evidence that four (4) months later, he took up employment with Juicy Landscaping in January 2021, which lasted six months as he had to do surgery. He worked five (5) days weekly and earned \$120.00 daily. After he had recovered enough, he got a job at Peter's Fowl Farm washing eggs.

The Court accepts the Employee's evidence of mitigation. Accordingly, the Employee is entitled to compensation of \$ \$6,364.80, representing (4) months' pay for immediate loss. However, this award is reduced by the earnings of \$2,600.00 the Employee received from cutting grass at \$300.00 every two weeks. Therefore, compensation under this head is limited to \$3,764.80.

(ii) **Exemplary Damages**

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.

(iii) **Manner of Dismissal**

Similarly, the Court finds no evidence that the Employee was dismissed in a manner that affected his ability to get employment. As such, we make no award under this head.

(iv) **Costs**

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.

16. In his submission, Mr. Kendall conceded that there ought to have been no deduction on severance. The Employee is entitled to be reimbursed for statutory deductions calculated on the severance.

Award

17. The Employee is entitled to further compensation of **\$3,764.80** for immediate loss.

Order

18. By reason of the matters aforesaid, the Court orders as follows:

1. The Employer shall pay additional compensation of **\$3,764.80** to the Employee for his unfair dismissal.
2. The Employer shall reimburse the Employee the statutory deductions calculated on his severance pay which has been remitted.
3. Payments shall be made no later than August 15, 2023.

Dated this 28th day of July 2023


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Hon. Samantha May-Francis
Vice President

