



ANTIGUA & BARBUDA

REFERENCE NO. 59 OF 2016 BETWEEN

IN THE INDUSTRIAL COURT

DEBBY LOOBY

Employee

and

KFC ANTIGUA LIMITED

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Judith Dublin

Member

Appearances:

Ms. Debby Looby, appearing in person

Ms. Kalisa Marks of Richards & Company, Attorneys-at-Law for the Employer

2021: September 28

2023: April 21

JUDGMENT

May-Francis, VP

Background

1. The Employer operates three KFC or Kentucky Fried Chicken franchises in Antigua and Barbuda pursuant to a Franchise Agreement with the renowned KFC Corporation in the State of Kentucky in the United States of America.

2. The Employee was employed in the Accounts Department from June 6, 2006, until her dismissal on May 8, 2008.
3. The Employee commenced proceedings by her Reference filed on September 30, 2016, in which she identified the main issues as unfair dismissal and 'fair' compensation for unfair dismissal.

The Employee's case

4. In her Memorandum of Claim, the Employee asserts that:
 - (i) She was employed in the capacity of Accountant on June 6, 2006
 - (ii) She worked forty (40) hours weekly from 8:00 a.m. to 4:30 p.m. with an hour lunch break and earned \$1100.00 weekly. In addition, she received a uniform allowance of \$30.00 and a travel allowance of \$60.00
 - (iii) Once employed, the Employer advised the Employee that she held the position of Accounts Assistant and not Account
 - (iv) Before commencing her employment, the Employee was engaged in a school programme for the prevention of crime and violence which she continued while employed
 - (v) She was bullied and harassed by the Employer into relinquishing her school programme
 - (vi) On May 8, 2008, she was unfairly dismissed and therefore seeks compensation

The Employer's case

5. In its Memorandum of Defence, the Employer disputes the Employee's claim for the following reasons:
 - (i) The Employee did not possess any qualifications to be hired as an Accountant and was at all material times employed as an Accounts Assistant
 - (ii) She commenced employment on June 6, 2006, subject to a two-year fixed-term contract.
 - (iii) The Employee was contracted to work a forty-hour (40) workweek from 8:00 a.m. to 4:30 p.m. with a thirty (30) minutes lunch break
 - (iv) The Employee's work hours did not permit time off to be given to the Employee to engage in the school programme, which the Employee did not reveal until after she was hired

- (v) The employees received a gross weekly payment of \$1,190.00, comprised of a basic salary of \$1,100.00, a travel allowance of \$60.00, and a uniform allowance of \$30.00
 - (vi) At no time did the Employer bully or harass the Employee
 - (vii) The Employee was fairly dismissed after her performance was reviewed and proved unsatisfactory
 - (viii) At the time of her dismissal, the Employee received her outstanding wages, allowances, vacation pay accrued, and notice pay in the total sum of \$6,165.90
 - (ix) The Employee's claim is denied in its entirety, and the reliefs sought by her should be refused
 - (x) Further, by correspondence dated October 10, 2007, the Employee gave the Employer notice that she did not wish her contract to be renewed
6. Before addressing the main issues, we examined the Employee's contentions that since the proposed employment contract had not been signed, she was employed for an indefinite term in the position of Accountant.
7. The Employee's evidence is that Mr. Austin Williams, the Employer's then Accountant and her husband are friends. She was then unemployed, and Mr. Williams invited her to apply for the position of Accountant. By correspondence dated June 6, 2006, she applied for the job and started working the same day after a brief meeting with Mr. Williams and Mr. Gregory Shillingford, the former Operations Manager. During the meeting, she was promised an employment contract.
8. In September 2006, Mr. Williams gave the Employee the proposed two-year fixed-term contract. On September 12, 2006, the Employee informed the Employer of her suggested changes to the proposed contract by delivering correspondence to Mr. Williams. In the correspondence, she proposed that her appointment should be that of an Accountant and not an Accounts Assistant. In addition, she suggested that her salary after the probation period should at least be \$1090.00 per month and fifteen (15) days for her annual vacation.
9. During cross-examination, the Employee stated that Mr. Williams had agreed that her work hours would have been flexible and that she would receive a gratuity of

12.5% per annum. Mr. Williams denied this and gave evidence that at no time did he have the authority to negotiate the terms of an employee's engagement in his capacity of Accountant.

10. The Employee accepted that Mr. Williams held the position of Accountant but was unsure of the Employer's organizational structure at the time and thought that perhaps there was a need for more than one Accountant. At all times, she regarded Mr. Williams as a colleague. She was never instructed to report to him, nor was she aware that Mr. Williams was not authorized to negotiate her contract.
11. Section C7 of the Antigua and Barbuda Labour Code permits an employer to enter into an individual contract of employment, provided the terms and conditions of employment do not fall below the standards of the Code.
12. Section C5 (1) of the Antigua and Barbuda Labour Code provides:

Every person who employs another shall, within ten (10) days of such employment, furnish said employee with a written statement which shall set forth-

- (a) the general responsibilities and related duties for which the employee is employed;*
- (b) the regular hours of work, rest periods;*
- (c) the starting pay, and method of computing same;*
- (d) the term of employment, if other than indefinite*
- (e) the period of probation, if any;*
- (f) his obligation, if any, imposed under section J13.*

13. We note that the Employer did not challenge the Employee's evidence that she first received the proposed contract, which outlined her duties and responsibilities, until September 2006 after working for three (3) months. Before that, no written statement of her terms and conditions of employment or even an offer letter had been given to her. Moreover, upon receiving the proposed contract, the Employee returned it to Mr. Williams unexecuted, along with her suggested changes. There was also no challenge by the Employer to the Employee's evidence that she would inquire about the status of the contract from time to time, but the same was not forthcoming.

14. The Employer has advanced a defence that a binding fixed-term employment contract existed and that the Employee, by her conduct, accepted the terms. From the evidence, it is clear that the Employee's employment was not frustrated as the employment contract began when the Employee started work, even if the contract was not signed. Further, the Employer engaged the Employee and accepted that she performed her obligations under the draft contract for twenty-three (23) months.
15. Notably, the proposed changes submitted by the Employee did not highlight any proposal regarding the duration of the contract. Accordingly, we have determined that although the contract remained unsigned, the Employee's employment was for a fixed term of two (2) years.
16. Regarding whether the Employee was engaged as an Accountant or as an Accounts Assistant, the Employee accepted that though she was previously employed as an Accounts teacher, she had no experience working as an Accountant. Additionally, based on the Employee's evidence regarding the duties and responsibilities performed for twenty-three (23) months and having examined the draft employment contract, we have concluded that the Employee was engaged as an Accounts Assistant. We had no evidence to support the Employee's contention that she is entitled to a gratuity of 12.5% per annum.

The Issues

17. The main issues, as identified by the Employee in Reference, are as follows:
- i. Was she unfairly dismissed?
 - ii. Compensation, if any, that is due to her

Resolving the Issues:

Was the Employee Unfairly

18. Given the pleadings, the legal framework within which the central issue of unfair dismissal must be determined is established by the following provisions of sections C 58 and C59 of the Labour Code:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

- (a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);**
- (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C59 (3)**
- (c) ...,**
- (d)...; or**
- (e)...;**

Provided, however, that there is a factual basis for the assigned reason

C 58 (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.

C 59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;**

...

C59 (2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of

- (a) a repetition of the misconduct; or**

(b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

(4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning”.

19. The onus is on the Employer to discharge its evidentiary burden of proving that the dismissal was not unfair by demonstrating it had good cause for the dismissal and acted reasonably in dismissing the Employee. We, therefore, look to the dismissal letter as to the reasons for the dismissal.

20. We note that the Employer’s Defence is that there existed a fixed-term contract of employment, with provisions that same could be terminated by either party giving one month’s notice. Learned Counsel Ms. Marks further submitted that by the letter of October 10, 2007, the Employee gave notice of her intention not to renew the contract. However, based on its content, the letter of October 10, 2007, did not amount to notice of intent not to renew; neither did the Employer treat it as such. We are fortified in our view as the evidence clearly shows that the Employee continued to work until May 8, 2008, when she was dismissed. In any event, we are reminded that Section C56 of the Labour Code provides that the termination of an Employee must be for cause.

21. As extracted from the dismissal letter dated May 8, 2008, the reasons for dismissing the Employee are stated as follows:

“Further to the meeting of May 8, 2008, in which we reviewed your behaviour and performance, over the last two weeks, we hereby terminate your services effective as at today’s date, May 9, 2008.”

22. The Labour Code at Sections C58 and C59 provide for the fair dismissal of an employee for gross misconduct and unsatisfactory performance. Mr. Shillingford’s evidence is that the Employee took unauthorized time off for her crime prevention programme and could not complete her task promptly. In his

witness statement, he also gave evidence that after the Employee was advised that the fixed-term contract would not be renewed, she *“threw a tantrum and threatened management”*.

23. However, from the dismissal letter, we could not identify the precise reasons for the Employee’s dismissal and or that her dismissal was attributed to the matters, that Mr. Shillingford attempted to put into evidence as to the reasons for the dismissal. In any event, having regard to the provisions of section C 10 (3) and (4) of the Labour Code, the Employer is **“conclusively bound”** by the contents of the dismissal letter. Furthermore, the underlying effect of Section C10(4) is to prevent the Employer from later introducing evidence of facts that could have been stated in the dismissal letter. In the final analysis, we cannot accept Mr. Williams’ evidence concerning the reasons for dismissal.
24. We are reminded of the decision of **Berridge and Others v Benjies Business Center Antigua and Barbuda (1996) UKPC 38** (November 7, 1996), 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.”**
25. Accordingly, the Employer has failed to discharge its burden of proving that the Employee was guilty of ‘behaviour’ (presumably misconduct) or performance (presumably unsatisfactory). Additionally, based on the contents of the dismissal letter and having heard the evidence of the witnesses, there was no sufficient factual basis for dismissing the Employee for misconduct or poor performance. We, therefore, find the Employee was unfairly dismissed.

Compensation

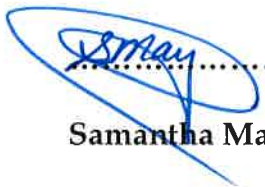
26. The uncontested evidence of the Employer, which was supported by documentary evidence, is that at the time of the dismissal, the Employee was paid the sum of \$ 6,165.90 broken down as follows:
- | | |
|-----------------------|-------------|
| Outstanding net wages | \$ 1,027.65 |
|-----------------------|-------------|

Notice pay	\$ 4,110.60
Outstanding vacation	\$ 1,027.65

27. Having determined that the Employee was employed for a fixed term which would have expired on June 5, 2008, and the Employer having unfairly dismissed the Employee on May 8, 2008, approximately fair weeks before the expiration of the contract, the Employee is entitled to loss of emoluments she would have earned if she had worked for the unexpired portion of her fixed term contract.

28. In the circumstances, **we award the sum of \$4,760.00**, being the equivalent of her total emoluments for the unexpired and unpaid portion of her fixed-term contract. Since the Employee had no guaranteed employment beyond the fixed term, we make no further award in respect of loss of earnings.

29. We order that the Employer pays the Employee the sum of \$4,760.00 no later than May 15, 2023.


.....
Samantha May-Francis
Vice President


.....
Judith Dublin
Member

