

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD 72 of 2018

BETWEEN:

MINDY FRANCIS

Employee

And

GORES' WHOLESALE LTD

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. Samantha May-Francis

Vice President

Appearances:

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

Mr. Justin L. Simon, KC, of Simon Rogers Murdoch, Attorney-at-Law for the Employer

2021: December 6

2022: November 25

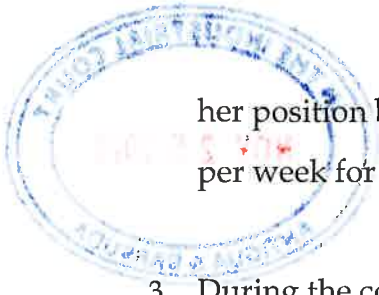
JUDGMENT

Brown, P:

Summary of Facts

1. The Employer was incorporated under the Laws of Antigua and Barbuda with its principal place of business situate at Old Parham Road in St. John, Antigua. Its business includes the importation and wholesale distribution of beverages and health care products.
2. The Employee commenced her employment with the Employer as a Cashier on October 26, 2016. Subsequently, after she was assigned additional duties,





her position became Cashier / Order Entry Clerk. Her last salary was \$475.00 per week for a five-day work week.

3. During the course of her employment the Employee was granted a loan by FastCash (Antigua) Limited (FastCash), in respect of which the Employer agreed to make monthly deductions from her salary and pay the same directly to FastCash. To that end, a Salary Deduction Authorization (the Authorization) was completed and signed by both the Employer and the Employee on June 12th and 14th 2018 respectively. The Authorization includes the Employee's request and certification in the following terms:

"I further request that before full settlement of my debt, I hereby irrevocably assign my final payment in the event of my termination to FastCash (Antigua) Limited.

I hereby certify that this authorization shall remain in effect in the amount of \$831.26 to FastCash (Antigua) Limited and shall not be subject to change or cancellation without written approval of FastCash (Antigua) Limited. I hereby authorize FastCash (Antigua) Limited to verify my employment details and compensation with Gores Wholesale".

4. The Employer's Senior Operations Officer, Ms. Ianthea Brumant, signed the Authorization on behalf of the Employer, thereby committing it to make the monthly deductions and the final payment to FastCash in accordance with the terms stated above.
5. On July 24, 2018, the Employer, through its Manager, Mr. Ogwambi Gore, proposed a mutual separation agreement to end the employment relationship. Pursuant to that proposal, the parties orally agreed that the

amount payable to the Employee would be \$3,809.64. Notwithstanding the Employee's irrevocable assignment of her final payment to FastCash and the Employer's consequential obligation, the Employee requested, and the parties further orally agreed that the said amount would be paid directly to her as her "final payment".

6. Subsequently, the Employer determined that the said amount of \$3,809.64 had been calculated in error and that the correct amount was in fact \$3,754.84. More importantly, the Employer recalled its obligation under the Authorization and prepared the final payment cheque in the joint names of the Employee and FastCash
7. On July 25, 2018, pursuant to the oral agreement, the Employee did not present herself in uniform for work although she had been scheduled to do so. Instead, as she had earlier intimated to Mr. Gore, she attended the Employer's premises in plain clothes with her uniform in a bag with a view to her employment being terminated by signing a written agreement which would supercede what had been agreed orally, collect her cheque and return the uniform.
8. While the Employee was at the premises, the Employer presented her with the Separation Agreement showing the final payment as \$3,754.84 instead of \$3,809.54. In addition, she was presented with the cheque for that amount in the joint names of herself and FastCash. The Employee refused to accept the cheque and / or sign the Agreement and left the premises with the uniform.
9. It is instructive to note that the terms of the Separation Agreement include the following obligations:
 - a) The Employee would tender her resignation in writing.

- b) The Employer would accept the resignation with immediate effect.
- c) The last date of employment would be the date stated in the resignation letter.
- d) The Employee would be paid the sum of \$3,754.84 and return all of the Employer's property then in her possession.
- e) By signing the Agreement, the Employee would release the Employer from any further obligations.

10. On July 26, 2018, having rejected the Separation Agreement, the Employee reported for duty in her uniform as usual. In response, the Employer advised her that it no longer considered her to be a member of staff, ordered her to leave the premises and demanded the immediate return of the uniform.

11. On July 28, 2018, at the Employee's request, the Employer issued a letter of termination, which reads:

"28 July 2018

Ms. Mindy Francis

...

Subject: Request for Termination Letter

This letter of termination concludes in its entirety our Mutual Separation Agreement dated July 25, 2018.

We do Hope this letter which you have requested on July 25, 2018, in addition to our Mutually agreed (Mutual Separation Agreement) is satisfactory and meets your approval.

You are hereby terminated. Your services are no longer required at this establishment and thank you kindly".

Sincerely Yours

..."

12. In the circumstances, the Employee contends that she was constructively and unfairly dismissed. In disputing the Employee's claim, the Employer contends that the employment relationship was terminated under the Separation Agreement, the terms of which were agreed orally.

Analysis

13. Having signed the Authorization, both parties well knew of its binding terms to which they had agreed with FastCash. In particular, they were aware of the requirement of the Employer to make the final payment to FastCash in the event that there was a termination of the employment.
14. It is common ground that, as initially proposed, the separation agreement would circumvent their respective obligations to FastCash by the issuance of the final payment exclusively to the Employee. Thus, it appears that (a) the amount of the final payment, and (b) the receipt thereof by the Employee were the two most critical components of the separation agreement.
15. As it turned out, at the time of the negotiations, Mr. Gore was not mindful of the Employer's obligations to FastCash. He apparently recalled those obligations only when he was reminded of them by Ms. Brumant. Accordingly, the amount of final payment in the sum of \$3,754.84 and the Employer's contractual obligation to pay that amount jointly to the Employee and FastCash were contrary to the oral agreement. In the circumstances, the Employer was constrained to revise the terms of the oral agreement as it did.
16. Upon hearing the Employee's concerns about the addition of FastCash as joint payee and the reduction of in the amount of the final payment, Ms. Brumant explained the reasons for the differences between what had been

orally agreed and the contents of the written Separation Agreement. We accept Ms. Brumant's evidence that, upon her explanation, the Employee accepted the revised amount but wholly rejected the joint payment and refused to sign the Agreement.

17. The Employer's position is that the separation occurred upon the presentation of the cheque and the written Agreement. The Employee's refusal to accept them meant that she had reneged on oral agreement which was binding and enforceable. The Employee's position is that what had been agreed orally was voided when she changed her mind, as she was entitled to do, on account of the differences between the oral and the written Agreement. In her view, the written Agreement, which was intended to supercede the oral agreement, was of no effect because it had not been executed.
18. As we understand it, under the written Agreement the termination would crystalize only upon the Employee's resignation. That requirement was not part of the oral agreement. Thus, it is clear that what had been orally agreed was not accurately represented in the written Agreement.
19. In our opinion, in the face of the Employee's objections and refusal to sign, the Employer had an obligation to re-engage the Employee towards acceptance of the terms of and the execution of the written Agreement. In the absence of further negotiations and the required consensus ad idem in relation to the written Agreement, there was no mutual separation. Since the Employee did not resign, she remained in her employment and was entitled to show up for work, as she did, on July 26, 2018.
20. In the circumstances, the issuance of and terms of the termination letter were unfortunate. The letter suggests that the reason for the termination was the

written Agreement, which required the Employee to resign and the Employer to accept the resignation date as the date of termination. In the final analysis, the Employer's reliance on the unexecuted written Separation Agreement as the basis for the termination is illogical and unsustainable.

21. By reason of matters aforesaid, we are constrained to conclude that the Employee was unfairly dismissed and is entitled to compensation. However, we also conclude that she contributed to her dismissal.
22. As we understand the evidence, the nub of the Employee's position on the date she was presented with the written Agreement is that the cheque was made payable jointly to herself and FastCash. Her intransigence on that point is most unreasonable in light of the clear terms of her express undertaking in the Authorization to irrevocably assign her final payment to FastCash.
23. In considering her contribution, we note that the Employee spoke to Mr. Gore in the morning of July 25, 2018, and indicated her willingness to deliver up her uniform, collect the cheque and sign the Agreement. Her response to the ensuing situation was also unfortunate. Rather than adopting a conciliatory approach in an attempt to resolve the impasse, the Employee elected to be confrontational by showing up for work the following day. The bad situation was compounded by her subsequent demand for a termination letter.
24. In the circumstances, we fix the Employee's contribution to her unfair dismissal at 50%, by which percentage her compensation assessed below will be reduced.

Compensation

25. We award compensation as follows:

(a) Notice Pay:

We award the sum of **\$475.00**, equivalent of her weekly salary.

(b) Basic Award / Loss of Protection:

The Employee worked for 21 months. Given her daily rate of \$95.00, we award the sum of **\$1,995.00**, the equivalent of one day's pay for each month of employment.

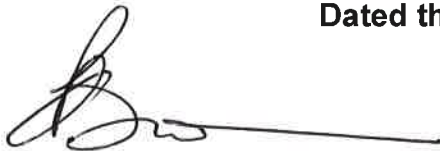
(c) Immediate Loss:

The Employee testified that, although she sent out applications, she was not successful in finding a new job until August 2018. Notwithstanding those applications, we are not convinced that her efforts were as diligent as they should have been. Accordingly, we limit the award under this heading to **\$8,233.33**, the equivalent of four months' salary.

26. As a result of the Employee's contributory fault, we reduce the total sum of \$10,703.33 awarded above by 50% to **\$5,351.67**. In addition, we also award her accrued entitlement of vacation pay in the sum of **\$570.00**, representing payment in lieu of vacation for 6 days.

27. In the premises, we order that the Employer shall pay the total sum of \$5,921.67 to the Employee, as compensation for her unfair dismissal and vacation pay, no later than December 31, 2022.

Dated this 25th day of November 2022



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Charlesworth O.D. Brown
President



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Samantha May-Francis
Vice president

