

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/18 of 2022

BETWEEN:

ANNABELLE NICHOLAS

Employee

And

CHIEF IMMIGRATION OFFICER/IMMIGRATION DEPARTMENT AND
THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. John H. R. Benjamin

Member

The Hon. Hesketh A. Williams

Member

Appearances:

Mr. Samuel James and Mr. Simon Leonard of Antigua and Barbuda Free Trade Union
for the Employee

Ms. Carla Brooks-Harris and Ms. Rose-Ann Kim, Crown Counsel of the Attorney
General's Chambers Attorneys-at-Law for the Employer

2023: November 15

December 01

*Senior Immigration Officer on vacation assisting independent private agency in
preparing form and securing appointment for a non-citizen's extension of residency
status - Employee receiving payment from applicant in respect of her assistance -
Employer investigating matter and summarily dismissing Employee after withdrawal
of its offer to transfer her - Whether the Employee denied natural justice and
procedural fairness - Whether or not dismissal unfair - Whether the Employee
contributed to her dismissal*

JUDGMENT

Brown, P

Background

1. The Immigration Department, a division of the Ministry of Foreign Affairs,
International Trade and Immigration, is charged with the day-to-day
administration of the Immigration and Passport Act, 2014. As head of that

ESDS Department, the Chief Immigration Officer, Katrina Yearwood, routinely receives and processes applications from non-citizens for extensions of time to remain in Antigua and Barbuda.

2. The Employee commenced her employment as Field Officer in the Immigration Department on June 1, 2002. On January 1, 2005, she was formally appointed as an Immigration Officer. As at December 8, 2020, her last emoluments package included a monthly salary of \$4,524.92, a Traveling Allowance of \$261.00 and a Duty Allowance of \$550.00.
3. Mr. Teobaldo Noso, a citizen of the Dominican Republic, operated a consultancy business, T & N Multilingual Services, provided services to non-citizens residing in Antiguans and Barbuda. Those services included the provision of assistance to non-citizens seeking temporary residency status and extensions thereof.
4. By letter dated December 08, 2020, the Employee was dismissed on the ground of misconduct. In particular, the Employer asserted that:

"As a result of your misconduct the employee and employer relationship cannot continue.

As a Senior Immigration Officer, you have brought the Department into disrepute and in addition your actions may be tantamount to a criminal offence including:

- *Breach of Section 9 of the Immigration and Passport Act 2014.*
- *Breach of Section 3 of the Prevention of Corruption Act 2004*
- *Misbehaviour in Public Office*
- *Fraud*
- *Breach of Trust"*

The Opposing Positions

5. In her Reference of Complaint commencing these proceedings, filed on May 9, 2022, the Employee identified 6 issues, the main one of which is whether or not she was unfairly dismissed. She also identified 5 sub-issues all of which relate to procedural fairness and the reasonableness of the Employer's actions leading up to her dismissal.
6. In her verbose Memorandum of Claim, comprised of 132 paragraphs, she set out a combination of facts, unnecessary evidence and premature submissions, the essence of which was her contention that she was unfairly dismissed. The bases of her claim are twofold:

- (a) a chronology of events involving her interaction or association with Mr. Noso and his business, her preparation of an immigration form on behalf

of one Rafael Sanchez and her procurement of an interview on his behalf with the Employer and her receipt of the sum of \$500.00 directly from Mr. Sanchez.

(b) The denial of natural justice and procedural fairness by the Employer in handling the matter and its eventual decision to dismiss her.

7. The Employer disputed the Employee's claim on the grounds that, by virtue of the said chronology of events, the Employee was guilty of serious misconduct, involved in an unethical situation, including a clear conflict of interest. Moreover, the Employer contended that the Employee acted in breach of the Passport and Immigration Act and was potentially liable to criminal proceedings, all of which brought the Employer into disrepute and rendered her continued employment untenable.

Findings of Fact

8. As the Chief Immigration Officer, Ms. Yearwood was the Employer's main witness. Her evidence was supported by witness statements and oral testimony from:
 - Alisha Henry, a Grade IV Immigration Officer with responsibilities for processing applications; validating the day to day work of the Department; and stamping and signing passports;
 - Juliana Browne, Senior Supervisor with responsibilities for the administration and supervisor of Employer's Human Resources Department including the accurate recording of all relevant matters on the Employee's file;
 - Mr. Sanchez, a citizen of the Dominican Republic, who, at the material time had applied for an extension of his temporary resident status so that he could lawfully remain in Antigua and Barbuda;
 - Ambassador Anthony Liverpool, Permanent Secretary of Ministry under the umbrella of which the Employer operated, who took certain steps towards the transfer or secondment of the Employee;
 - Theresa R. Thomas, one of the Employer's Station Chief's with responsibility for transcribing the audio recordings of the meetings convened by Ms. Yearwood in respect of the situation leading up to the Employee's dismissal.
9. We have carefully read all the witness statements, listened attentively to those testifying, meticulously observed the demeanour of the witnesses and perused

the exhibits in this matter. It is our considered opinion that the Employee and her witness, Mr. Noso, were significantly less credible than Ms. Yearwood and the other witnesses for the Employer.

10. At the end of the day, we find that there is a preponderance of evidence in favour of the Employer. In other words, our opinion is that the Employer has discharged its evidentiary burden by establishing facts which, on a balance of probability, ground its conclusion that the Employee was guilty of serious misconduct. In particular, in accordance with what is recited in the dismissal letter, our summary of findings of fact includes the following:

- (a) Prior to July 2020, the Employee shared an association with Mr. Noso whereby she would, from time to time, visit his business place and do things including errands for him in consideration of which she would be paid. In particular, she would from time to time help Mr. Noso with his immigration clients as to what to do to get extensions of their residency status and to get their applications fast-tracked.
- (b) On July 24, 2020, while holding the position of Immigration Officer, the Employee did, in collaboration with or on the instructions of Mr. Noso, prepare the relevant application form for Mr. Sanchez towards an extension of his residency status.
- (c) The Employee procured an advantage for Mr. Sanchez by utilizing her connections and familiarity with at least one of her colleagues within the Department to procure the appointment for him.
- (d) In furtherance of the objective of obtaining the extension, during a pre-arranged meeting, the Employee did accept the sum of \$500.00 from Mr. Sanchez while she was seated in her vehicle on Church St. in the vicinity of the Super Power store.
- (e) By herself or in concert with Mr. Noso, the Employee deliberately or recklessly led Mr. Sanchez to believe that, based on the payment he delivered to her, his application for the extension of time would have succeeded without any additional payment by him.
- (f) As admitted by her, the Employee's actions aforesaid had compromised or had the potential to compromise the transparency and credibility of the Employer. By her conduct, the Employee did bring the Employer "into disrepute" for which she expressly apologized.

- (g) The Employee's conduct potentially rendered her liable to a criminal investigation and related criminal court proceedings.

The Reason for the Dismissal

11. Section C 58 provides for the determination of whether or not the dismissal was unfair. Firstly, Section C 58(1) requires the Employer to prove that it had a good reason for the Employee's dismissal. Once the Employer discharges its evidentiary burden of proving the factual basis of its valid reason for the dismissal, its burden extends to proving that it acted reasonably under Section C 58(2).
12. Having come to that conclusion in respect of Section C 58(1), we are duty bound to consider the reasonableness or unreasonableness of the Employer's action in dismissing the Employee in the manner it did, at the time it did, under the then prevailing circumstances.
13. Suffice it to say, in our opinion, there are several elements of unreasonableness, all of which relate to breaches of natural justice and the principles and practices of good industrial relations:
 - (a) Failure to provide the Employee with copies of the letters, reports, statements or minutes of meetings containing accusations and allegations against the Employee. There is no doubt that the Employer unreasonably failed or refused to make copies of these available to her. The failure or refusal is most glaring in relation to the statement issued by Mr. Sanchez and the transcript of the audio recordings of the meetings.
 - (b) The investigative process adopted by the Employer was flawed in that it excluded the Employee from all stages of the process. This aspect of unreasonableness is compounded by the Employer's failure to formally communicate to the Employee, in a timely manner or at all, the outcome of its investigation. This aspect of unreasonableness is most noteworthy having regard to the factual matrix within which the investigation was conducted.
 - (c) Notwithstanding the seriousness and the potential impact of the allegations against her, the Employer appeared to have had scant regard for the long tenure of the Employee. Such long tenure of over 15 years should have resulted in a more conscious effort on the part of the Employer to conduct the entire process in a more open and transparent manner.

- (d) The Employer's practice of placing reports, correspondence and minutes in relation to the Employee's conduct on her file, without providing her with copies of the same, is patently unreasonable. Such a practice cannot be justified and should not be condoned in the modern practice of good industrial relations. Accordingly, we strongly condemn that practice, whatever its origin may be.
- (e) Strikingly, the Employer made several unfortunate and unreasonable missteps in its effort to transfer the Employee to the Ministry of Tourism. That move, regardless of the stage to which the process had advanced with the involvement of the Permanent Secretary or the Minister of Tourism, demonstrated the Employer's determination that the appropriate disciplinary action against the Employee for her transgressions was a "transfer", which it deliberately set in motion.
- (f) Having set the transfer in motion and engaged its Permanent Secretary and the Minister of Tourism in the process, it was unreasonable for the Employer to unilaterally abort the process by withdrawing the transfer without any advance notice to or consultation with the Employee and /or her then engaged legal representative.
- (g) Further, in the circumstances, the Employer's failure or refusal to engage the Employee's legal Counsel by way of a meeting or other appropriate communication in light of the Employee's expressed concerns is also unreasonable. Such engagement could foreseeably have resulted in an outcome other than the subsequent summary dismissal.
- (h) By October 2, 2020, the Employer had already determined that the Employee's misconduct warranted immediate termination and a possible criminal investigation. However, having taken the steps to transfer her and having communicated the same to her on that date, the Employer's obvious "flip-flop" in withdrawing the transfer sometime between November 8 to December 7, 2020, while the Employee was on sick leave, is also blatantly unreasonable.
- (i) Moreover, in light of the Employer's directive that the Employee should report to the Chief Immigration Officer on December 8 on the expiry of her sick leave, it was unreasonable to summarily dismiss her on that date. The unreasonableness here is also obvious in light of the several developments between the desire to transfer on October 2, 2020, and the desire to withdraw the transfer over one month later.

14. Having regard to all the direct and surrounding circumstances, it is our considered opinion that the Employer acted unreasonably in dismissing the Employee. Thus, it failed the test of reasonableness under Section C 58(2). Accordingly, we are constrained to declare that the Employee was unfairly dismissed and is entitled to compensation.
15. Notwithstanding the finding of unfair dismissal, on the facts of this case we also find that the Employee is blameworthy in respect of her dismissal. Based on the evidence, we fix the degree of her blameworthiness at 60%, by which percentage her assessed compensation will be reduced.

Compensation

16. We assess compensation under the following headings:

- (a) Notice Pay

A monthly paid Employee who is summarily dismissed is entitled to notice pay equivalent to her monthly salary and fixed contractual allowances. Accordingly, **we award the sum of \$4,524.92** under this heading.

- (b) Loss of Protection

When an employee is unfairly dismissed, it is obvious that the employer infringed upon her statutory right. The compensation for that loss of protection is the equivalent of severance pay if a situation of redundancy existed. The Employee was engaged from June 01, 2002, until December 08, 2020, a total of approximately 18.5 years. Therefore, **we award the sum of \$68,707.52** ($\$3,713.92 \times 18.5$) to which she is entitled under this heading.

- (c) Immediate Loss

In support of her efforts to mitigate her loss, the Employee submitted three copies of job applications made in January and February 2021. However, when examined under oath, she testified that she sent out at least 25 applications, despite which she remained unemployed. Her evidence in that regard was not challenged seriously or at all. We are not satisfied that she could not have found alternative employment if she lowered her expectations. In the circumstances, **we limit our award under this heading to \$22,283.52** ($\$3,713.92 \times 6$), the equivalent of 6 months' salary.

- (d) Loss due to Manner of Dismissal

Based on her testimony, which was not challenged, we are satisfied that her unfair dismissal rendered the Employee less attractive to potential

new employers. In the circumstances, we award the sum of \$4,524.92 the equivalent of her total monthly emoluments.

(e) Loss of Fringe benefits

For present purposes, we treat her total allowances as fringe benefits which the Employee would have earned during the six-month period of her immediate loss. Accordingly, we award the sum of \$4,866.00 (\$811.00×6) under this heading.

(f) Future Loss

In our estimation, rather than sit back and wait as she appears to have done, the Employee could have found alternative employment at a lower salary, engaged in some form of self-employment or undertook some form of alternative vocational training. In the circumstances we make no award under this heading.

(g) Exemplary Damages

Upon our careful consideration of the facts, notwithstanding the unreasonableness of the dismissal, we are not satisfied that an award should be made under this heading.

17. We have noted the Employee's application for costs. However, given the statutory restriction, we make no award in that regard.

18. Having regard to our determination above that the Employee is blameworthy to the tune of 60% for the unfair dismissal, we discount her total compensation, assessed above, accordingly. As a result, the net amount of compensation to which the Employee is entitled is **\$41,962.75** (\$104,906.88 ×40%).

Order

19. By reason of matters aforesaid, we order that the Employer do pay the net sum of **\$41,962.75** to the Employee, as compensation for his unfair dismissal, no later than January 15, 2024.

Dated this ^{07th} day of December 2023



Charlesworth O. D Brown
President



John H.R. Benjamin
Member



Hesketh A. Williams
Member