

ANTIGUA AND BARBUDA



IN THE INDUSTRIAL COURT

REFERENCE NO. C/ 54 of 2016

BETWEEN:

ANNAKAY CAMPBELL

Employee

And

OLTREMARE LIMITED t/a THE CROW'S NEST

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. John Benjamin

Member

The Hon. Judith Dublin

Member

Appearances:

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

Ms. Sharon Cort-Thibou, of Cort & Cort, Attorneys-at-Law for the Employer

2017: July 25

2023: September 29

Claim of unfair dismissal - Employer failing to state precise reason for dismissal - Preliminary application for ruling of unfair dismissal - Assessment of compensation - Matters to be considered in making award of Immediate Loss.

JUDGMENT

Brown, P.

Background

1. The Employee commenced her employment in the Employer's restaurant as a Junior Chef on October 16, 2015. She was summarily dismissed by letter dated April 30, 2016, at which date her rate of pay was \$12.00 per hour for 8 hours over a 5 day work-week. In addition she was earning a fringe benefit \$5.00 per hour as her share of the Employer's service charge fund.
2. In its letter of dismissal, the Employer cited the Employee's "attitude and poor work ethics" and stated:

"You're been terminated for these reasons:

1) Lack of directive, not following orders given to you by your superiors such as preparations of dishes and standard plating presentation.

2) Negative attitude, being insulting to your superiors."

3. At the commencement of trial, in reliance on the provisions of Section C 10 of the Antigua and Barbuda Labour Code, the Employee's Representative made a preliminary application for a ruling that the Employee was unfairly dismissed.
4. After a careful consideration of the dismissal letter and the opposing submissions of Counsel, we found and declared that the Employee was unfairly dismissed and is entitled to compensation. Thereafter, the proceedings continued towards the assessment of compensation due to the Employee, subject to: (a) her contribution, if any, to her dismissal, and (b) her duty to mitigate her loss.
5. After hearing oral testimonies of the Employee's and the Employer's Operations Manager, Maurizio Pandini, and considering the documentary evidence, we reserved our assessment of compensation and invited the parties to file submissions to that end.

The Assessment

6. Essentially, the Employee's submissions comprised of a quantification of her claims under several headings, including Vacation Pay; Overtime Pay; and Costs. Save for indicating the bald numerical indices, Mr. Carty made no effort to justify the several items of his claim. On the other hand, Learned Counsel filed comprehensive submissions, with supporting authorities, justifying the Employer's position as to what awards should be made.
7. In the circumstances, having regard to the settled practice in this Court and the authorities cited by Counsel, we award compensation under the several headings as follows:
 - (a) Payment in lieu of Notice (Notice Pay)

Under section C 9 (3) (b) of the Labour Code, an employer is required to give advance notice of his intention to terminate an employee's, which notice must be at least equivalent to the interval of the employee's paydays. In this case, the Employee was paid fortnightly at the rate of \$12.00 per hour, \$96.00 per day or \$480.00 per week. At the date of her dismissal, she received a final pay cheque in the sum of \$2,947.09 including \$1,440.00, representing 15 days' pay. In light of that payment, we make no award under this heading.

(b) Loss of Protection from unfair Dismissal

It is well settled that the basic compensation payable to an unfairly dismissed employee is equivalent to what he would have received if his services were terminated because of redundancy. Under section C41 of the Labour Code severance pay must consist of at least one day's pay for each month, or major fraction thereof, of the term of employment. The Employee worked a total of 6.5 months between October 15, 2015 to April 30, 2016. She is therefore entitled to pay under this heading at the rate of \$96.00 per day. Accordingly, we award the sum of \$672.00 ($\$96 \times 7$) under this heading. In effect, we reject the Employee's understated claim and accept the Employer's proposal as being accurate.

(c) Immediate Loss of Earnings

An award under this heading seeks to compensate an unfairly dismissed employee for his loss immediately after dismissal up to the date of trial. While the preceding two heads involve precise mathematical calculations, the head of Immediate Loss involves proof on the balance of probability of the Employee's efforts to mitigate her loss. Apart from her direct testimony, we must consider several factors, some of which are imponderables. Ultimately, we must engage in some degree of estimation.

In her submissions, Learned Counsel cited three leading authorities and underscored some of the several factors and variables that have to be taken into consideration. These include:

- a. the sector of industry in which the Employer conducted its business;
- b. the nature of the Employer's business;
- c. the Employee's position;
- d. the weight and adequacy of the Employee's evidence of mitigation;
- e. the need for proportionality;
- f. the Court's overall statutory mandate to make a fair and just award.

In the final analysis, we are convinced that the Employee made reasonable efforts to mitigate her loss. However, having regard to the several other factors and variables, we limit our award under this heading to \$10,400.00, the equivalent of 5 months' pay for the period May to September 2016.

(d) Exemplary Damages

It is noteworthy that the largest quantum of claim advanced by the Employee under any one category is almost \$25,000.00 as Exemplary Damages. Our statutory mandate allows us to make an award under this heading where a dismissal is "harsh, oppressive and contrary to good industrial relations practices". We are mindful that when considering awards under this heading, there is always the risk of double-counting, which we endeavour to

avoid. As submitted by Counsel, our approach, as usual, is to focus on the conduct of the Employer as a whole.

In our opinion, the Employer's conduct in this case has not met the required threshold for an award of exemplary damages. It cannot reasonably be said that the Employer behaved in such a "harsh and oppressive" manner as to warrant such an award. As a result, we reject the Employee's claim for an award under this heading.

(e) Fringe Benefits

We have noted Counsel's submission in relation to the Employer's evidence of the difference in service charge rates during the "low" and "high" seasons, respectively. We have also noted that in April 2016, the Employee's final pay cheque included the sum of \$360.00 as Service Charge for 72 hours of work. It is obvious that at that time the Employee was being paid at the service Charge rate of \$5.00 per hour. Based on the evidence, we split our award into two parts under this heading: Firstly, the equivalent of her earnings from the service charge for a period of 2 months at the rate of \$5.00 per hour or \$200.00 per week in the total sum of \$1,733.33 $\{[(\$5 \times 8 \times 52) / 12] \times 2\}$. Secondly, the similar equivalent at the lower rate of \$3.00 for the ensuing 3 months in the sum of \$1,560.00. Therefore, the total award under this heading is \$3,293.33

8. Given the extent of the Employee's claim and the Employer's convincing submissions, we make no further award of compensation or costs, so that the total sum to which the Employee is entitled under the headings above is \$14,365.33.

Order

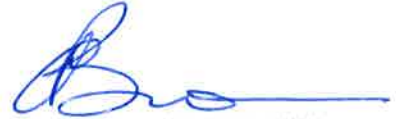
9. And we Order that the Employer do pay the sum of **\$14, 365.33** to the Employee, as compensation for her unfair dismissal, no later than October 31, 2023.

Postscript

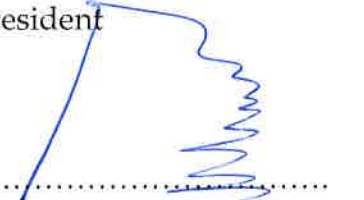
10. Finally, we express our deep appreciation for the indulgence of the parties and offer our sincere apologies for the delay in the delivery of this Judgment. Without attempting to justify the delay, we mention that, as a department of the government of Antigua and Barbuda, we have laboured under difficult circumstances over the years. Needless to say, we have experienced more than our fair share of challenges and consequential issues in relation to the limited

financial and human resources allocated to the Court, over which we have absolutely no control.

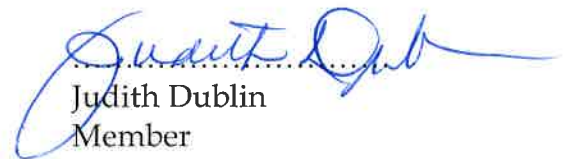
Dated this 29th day of September 2023



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Charlesworth O. D Brown
President



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John Benjamin
Member



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Judith Dublin
Member

