

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO. 26 of 2022

BETWEEN:

RAYEL STEWART

Employee

And

PADDY PRENDERGAST PRODUCTION SERVICES

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 Simon Leonard of the Antigua and Barbuda Free Trade Union,
Representative for the Employee

Ms. E. Ann Henry KC of EAH Business & Legal Solicitors (EC), for the Employer

2023: August 01

2024: June 28

Claim of unfair dismissal and payment of accrued statutory entitlements - Whether employee was dismissed or abandoned his job - Effect of failure to state reason for dismissal - Effect of Employer's use of "bad words" - Whether dismissal fair - Assessment of accrued statutory entitlements.

JUDGMENT

Brown, P

Overview

1. The Employer is a registered entertainment business owned and operated by Event Producer and Musician, Patrick "Paddy" Prendergast, a national of Ireland. It is engaged in a number of activities, including the production of shows and performances by the band known as Asher Otto and Itchyfeet, and the operation of a Storage Park. Its headquarters is situate at Midway, Clarke's Hill, Antigua.
2. The Employee was first employed by the Employer as a Crew Member on a part-time basis sometime in the second half of 2015. He subsequently became a permanent worker and was assigned various duties in different aspects of the

Employer's businesses. In a letter dated August 27, 2019 and addressed "To Whom it may Concern" the Employer stated that the Employee "has worked for our companies for the past three years and eight months in the capacity of production crew and driver". At the date of termination of his employment in November 2019, his wages were paid weekly at the rate of \$900.00 per week.

3. Contrary to section C46 (1) of the Antigua and Barbuda Labour Code, the Employer kept no accurate and complete record of the various aspects of the Employees' employment.
4. The Employee contended that by letter dated November 29, 2019, he was unfairly dismissed and is entitled to compensation. The Employer disputes that he was dismissed unfairly or at all and contended that the Employee terminated the employment relationship by resignation or abandonment. Accordingly, the main issue to be determined is: "whether as a matter of fact, the Employee was dismissed by the Employer".
5. It is conceded by the Employer that the secondary issue as to whether there was an unfair dismissal would be resolved automatically in favour of the Employee if he was dismissed by the Employer's letter dated November 29, 2019.
6. During his tenure, the Employee was the Employer's "best worker". Prior to November 27, 2019, he received no warning letters complaining of any misconduct or poor performance. On that date during a meeting with the Employer, he received two warning letters dated November 25 and 27, 2019, respectively, complaining of his insubordination and poor performance. Most importantly, as stated in his letter dated November 29, 2019, the Employer maintained that at a meeting held on that date the Employee indicated, with finality, that the job no longer suited him.
7. In their closing submissions on behalf of the Employee, learned Representatives Messrs James and Leonard urged the Court to find that the latter letter effected a dismissal; that the dismissal was unfair; that the Employee should be paid compensation plus outstanding vacation pay, premium pay and public holiday pay.
8. On behalf of the Employer, learned Counsel submitted that the Employee quit his job and that his claim should be dismissed. Alternatively, she conceded that if the Court determines that the Employer dismissed the Employee by its letter dated November 29, 2019, then the dismissal would be unfair since the Employer failed to disclose any precise reason for the dismissal. In relation to the ancillary claims, Counsel firstly contended that the amounts awarded, if any, should be

limited because of the Employee's failure to substantiate them. Secondly, she also submitted that such claims are limited by the Limitation Act, 1997.

Was the Employee dismissed?

9. The warning letters issued on November 25 and 27, 2019, referred to unacceptable aspects of the Employee's "conduct on the job". Both letters, which were issued at the meeting held on November 27, 2019, ended with the identical sentence: "Please ensure this does not occur again."
10. The final letter dated November 29, 2019, reads :

Dear Mr. Stewart.

WITHOUT PREJUDICE

Following our meeting on Wednesday 27th November, in which you were issued with two letters of warning regarding neglect of your duties in the past week, you indicated by your word, actions and attitude that this job no longer suited you.

Though we have had difficulties from time to time, generally we felt that your performance in the job was acceptable. We are sorry it ended this way after a number of years.

I attach payment for the whole of your last week, and as a gesture of goodwill, it also includes two weeks holiday pay.

Please acknowledge receipt and also that you have no further claims of any sort against me or any of our trading entities.

... "

11. The contents of the latter letter requires us to consider whether or not the Employee expressly indicated or evinced an intention to terminate his employment. Our careful examination of the evidence reveals no such indication or intention on the part of the Employee. As a matter of fact, we find that neither at the meeting on November 27, 2019 nor subsequently, did the Employee engage in any act of misconduct, insubordination or poor performance which could justify his summary dismissal two days later.
12. Moreover, we find that although the Employee complained about the long hours of work and the Employer's failure to pay statutory contributions on his behalf to the Medical Benefits and Social Security Schemes, he evinced no intention to resign, quit or abandon his job.

13. In the premises, we find that the letter dated November 29, 2019 terminated the employment relationship. And we agree with the Employee's submission that, in effect, it was a letter of dismissal. It could not have the purpose intended by the Employer because, as conceded by Counsel, it included no precise reason for the dismissal. For those reasons, we conclude that the Employee was unfairly dismissed and is entitled to compensation.

14. We assess compensation as follows:

(a) Notice Pay

We award the sum of \$900.00, being the equivalent of the Employee's weekly wages, in lieu of notice.

(b) Basic Award for Loss of Protection

Doing the best we can with the available evidence, we rely on the Employer's letter referred to in paragraph 2 above, and fix the period of employment from January 1, 2016 to November 29, 2019. In the circumstances, the Employee having been employed for 47 months at the last rate of \$150.00 per day, we accept Counsel's submission and **award the sum of \$7,050.00**, under this heading

(c) Immediate Loss

The Employee found alternative employment immediately after his dismissal at the rate of \$100.00 per day, \$50.00 less than his previous pay. As pointed out by Counsel, he made no effort to mitigate his loss, As a result, allowing a reasonable time to settle down and reassess his situation, **we award the sum of \$3,900.00** the difference in his wages for the three months immediately after his dismissal, under this heading.

(d) Future Loss

There are no evidentiary basis for any award under this heading.

(e) Exemplary Damages-

In pursuing the Employee's claim under this heading, Messrs. James and Leonard relied on the Employee's testimony and urged us to find that the Employer physically assaulted him. It is noteworthy that his evidence in that regard was not foreshadowed either in his Memorandum or his witness statement. Further, we also note the Employee's limited evidence in relation to the Employer's use of profanity and abusive language. It is instructive that the Employer admitted to sometimes using "bad words" while speaking to the Employee.

In the circumstances, we are not convinced of the Employee's credibility in relation to the alleged physical assault and verbal abuse. And in the absence of any evidence of formal complaints from the Employee throughout his four-year tenure, we are not satisfied that there is sufficient evidentiary basis for any award of exemplary damages. In our estimation, the utterances of the Employer were tacitly accepted or tolerated by the Employee as part of the course of conduct between them. In the final analysis, we find no evidence of "willful bad behavior of the Employer in effecting the dismissal" which is sufficient to trigger the exercise of our discretion under this heading.

(f) Accrued Statutory Entitlements

Separate and apart from the heads of compensation for unfair dismissal, the Employee is entitled to outstanding payments which accrued under various provisions of the Labour Code. We assess those entitlements as follows:

(i) Vacation Pay

In making the award under this heading, we have taken into consideration Learned Counsel's submission in respect of the effect of section 11 of the Limitation Act, 1997 in relation to claims for unpaid monies as applied in **Ref. No. 4 of 2014: Joyanne Canoville v. Dickenson Bay Hotel Management Limited**. However, given the commencement date of the employment in January 2016 and the accrual of his vacation entitlement in arrears from year to year, his claim under this heading is not affected by that Act.

We note that the Employee testified that he never took vacation. It is also noteworthy that the Employer offered two weeks holiday pay "as a gesture of goodwill". Based on the evidence, we find that the Employee is entitled to outstanding vacation pay at the rate of one day's pay for each month of employment. In the circumstances, **we award the sum of \$7,050.00** (\$150 x 47) under this heading.

(ii) Public Holiday Pay

The Employee testified that "on average" he worked "8 public holidays per year" for each of which he was paid at the "flat rate". The Employer offered no rebuttal evidence on that point. In the circumstances, notwithstanding Counsel's valid submissions against making an award under this heading - being mindful of the settled public holidays, the nature of the Employer's businesses and the absence of any records from the Employer - we accept the Employee's evidence that he worked on some public holidays. Accordingly, based on section C 15 (2) of the Labour Code, in addition to his basic pay, he was entitled to public holiday pay at the rate of 150 % of his basic rate or \$225.00 (\$150x1.5). The

result is that he was short-paid by that amount on each of those days. By logical extension, the Employee is entitled to the payment of \$1,800.00 for each year he worked overtime on 8 public holidays. Given his claim covering the 3-year period up to the end of his employment, **we award the total sum of \$5,400.00 under this heading.**

(iii) Premium Pay

Similarly, since the Employee's claim under this heading covers the 3-year period up to the end of his employment, it is not affected by the Limitation Act.

Under section C 26 of the Labour Code, the rate of premium pay is "one-and- one half times" his basic hourly wage. In the absence of any proper records or contrasting evidence from the Employer, we are inclined to accept the Employee's evidence that he worked overtime from time to time. He testified that he worked "at least 30 hours overtime weekly". His claim is for overtime pay over 156 weeks. However, we are of the opinion that he exaggerated the number of hours he worked. In the circumstances, we limit the number of his overtime hours to 20 each week over 104 weeks.

Since his daily rate was \$150.00 and his hourly rate was \$18.75, his premium pay rate would be \$28.13. This means that since he received only his regular rate, he was short-paid by \$9.38 per hour for 20 hours over 104 weeks. Thus, **we award the sum of \$19,510.40**, being the total amount of short-payment, under this heading.

Order

15. By reason of matters aforesaid, we order that:

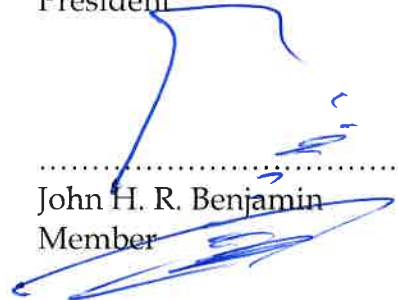
- (1) The Employer do pay the total sum of \$11,850.00 to the Employee as compensation for his unfair dismissal.
- (2) The Employer do pay the total sum of \$31,960.40 to the Employee as outstanding accrued statutory entitlements.
- (3) The Employer do pay statutory interest in the sum of \$14,382.18 to the Employee - being interest on the said sum of \$31,960.40 at the rate of 10% per annum from the date of dismissal up to the date of this judgment.
- (4) The Employer shall pay the aggregate sum of \$58,192.58 to the Employee no later than July 31, 2024.

- (5) The Employer shall pay additional prorated interest in accordance with paragraph (3) above from the date of this judgment until the date of payment.
- (6) There shall be no order as to costs.

Dated this ^{28th} day of June 2024.



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Charlesworth O. D. Brown
President



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John H. R. Benjamin
Member



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Hesketh A. Williams
Member

