

ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMBER

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 3 of 2019

BETWEEN:

ANDREKER CHRISTOPHER

Employee

and

SULMIC MANAGEMENT LIMITED

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. John R.H. Benjamin

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

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

Mrs. Cherissa Roberts-Thomas instructed by Mrs. Nelleen Rogers-Murdoch, Attorneys-at-Law for the Employer

2021: November 8

2023: March 23

2024: February

Employee applied for 24 days' vacation- Employer approved 12 days- Employee travelled overseas; On the eve of her vacation ending, Employee advised Employer she would be submitting sick leave- Employee did not submit sick leave until her return two weeks later; Employer claims Employee abandoned her job and removed Employee from work schedule; Employee claims to have been constructively and unfairly dismissed; did the Employee abandon her job; was she constructively and unfairly dismissed; did she contribute to her dismissal; compensation if any due to the Employee

JUDGMENT

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Background

1. The Employer is a registered company carrying on business as a management company managing several local businesses. It was also the owner and operator of a business referred to as Benz Bar & Casino.



2. The Employee commenced her employment with the Employer as a Cashier at the casino in March 2014. Her responsibilities included handling sales from sports betting and ticketing machines and providing an account of takings at the end of her shift. At the date of her dismissal in July 2018, the Employee was earning \$14.00 per hour. Her work hours were from 5:00 p.m. until 11:00 p.m. since she maintained full-time employment at the St. John's Corporative Credit Union.
3. On April 24, 2018, the Employee requested twenty-four (24) days of vacation commencing May 15, 2018, until June 1, 2018. The Employee's request for twenty-four (24) days of vacation was denied. However, the Employee was approved for twelve (12) vacation days from May 17 to May 30, 2018.
4. The Employee proceeded on vacation, which included her travelling overseas to her native Jamaica. However, she did not report for duty on May 31, 2018, her vacation having ended on May 30, 2018. Rather, on May 30, 2018, via WhatsApp exchange, prompted by her Supervisor, the Employee advised the Employer that she was getting a medical leave certificate from a doctor in her native Jamaica. She indicated that upon her return, she would have her doctor in Antigua issue her a certified medical certificate.
5. Further attempts by the Supervisor to reach the Employee on June 4th and 6th were unanswered. On June 6, 2018, via WhatsApp messaging, the Supervisor advised the Employee that she had been scheduled to work on June 7, 2018.
6. The Employee remained absent for two (2) more weeks. After June 11, 2018, the Employer removed the Employee from the work schedule. On June 15, 2018, the Employee reported to the workplace and submitted a certified medical certificate from a local doctor covering her absence from May 31 to June 14, 2018.
7. By letter dated August 13, 2018, the Employee wrote to the Employer indicating that the Employer, having failed to schedule her for duty, repudiated the employment contract and that she accepted the repudiation. The Employee, by her Reference filed on January 16, 2019, claims to have been constructively and unfairly dismissed by the Employer.

The Issues

8. Based on the Memoranda, the main issues for consideration are:
 - (i) Did the Employee abandon her job?
 - (ii) Did the Employer constructively and unfairly dismiss the Employee

Legal Framework

9. Under the caption "Unfair Dismissals", C 56 of the Antigua and Barbuda Labour Code (the Labour Code) states:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

10. Section C 58 (1) sets out good cause for dismissal. It states:

"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)

(c)

(d) or

(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

11. Section C 58 (2) states:

"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."

12. Section C 59 (1) makes provision for termination due to misconduct thus:

"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;

(b) committed a criminal offence in the course of his employment, without the consent, express or implied, of the employer; or

(c) behaved immorally in the course of his duties.

13. Constructive dismissal is not an express statutory provision of the Labour Code but rather fundamental principles of common law. The landmark judgment in **Western Excavating (ECC) Ltd. v. Sharp [1978] 1 All ER 713** lays out four foundation

elements to create constructive dismissal. It requires an examination of the employer's conduct to determine whether there has been a repudiatory breach on the employer's part, which goes to the root of the employment contract and entitles the employee to treat himself as being wholly discharged from any further performance under it without delay.

The Evidence

14. Mr. James Brooks, witness for the Employer, gave evidence that:

- (i) The Employee applied for 24 days' vacation but was approved for 12 days
- (ii) On May 30, 2018, the Supervisor reminded the Employee of her May 31, 2018, return date. It was then the Employee informed the Employer that she would be getting a sick note from the doctor in Jamaica
- (iii) The Supervisor inquired whether the Employee was going to send in the sick note from the doctor in Jamaica
- (iv) The Employee failed to provide adequate information to the Employer concerning the period of her illness
- (v) The Employee was not contactable after May 31, 2018, despite efforts to reach her via WhatsApp exchange and telephone
- (vi) During the period May 31 to June 11, 2018, the Employer reflected on the schedule that the Employee was off sick
- (vii) The Medical Leave Certificate presented to the Employer on June 15, 2018, certified that the Employee had been examined in Antigua when she was in Jamaica.
- (viii) Following receipt of the Medical Leave Certificate on June 15, 2018, the Employer attempted to contact the Employee but was unsuccessful.
- (ix) The total leave period for which the Employee was off duty amounted to the 24 days the Employee initially requested.

15. Ms. Veronica Mohabeer, the Employee's Supervisor, also gave evidence. Her evidence mirrors that of Mr. Brooks. Her evidence confirms that the Employee failed to respond to her messages and that Mr. Brooks attempted to contact the Employee between June 17th and 20th, 2018. She also gave evidence that it was the Employer's policy, as provided by the Labour Code, for employees to submit a medical leave certificate on the third day away from the workplace due to illness, hence her inquiry on June 4, 2018, concerning the Employee's submission of a 'sick leave' from a doctor and information of when the Employee's 'sick leave' would expire. Her evidence is that the Employee provided no indication of the dates or the duration of her illness. Once the Employee had indicated she was ill on May 30, 2018, the expiration date of her vacation, the Employee provided no further details.

16. We note the following evidence given by the Employee:

- (i) The Employee admitted to having not been approved for 24 vacation days
- (ii) She travelled to Jamaica on a ticket which had a return date of June 14, 2018, despite having approved vacation to May 30, 2018
- (iii) Her supervisor contacted her to remind her of her return date on May 30, 2018
- (iv) She advised the Supervisor that she had fallen ill and undertook to get sick certificate from her doctor in Jamaica
- (v) She failed to provide any medical note from the doctor in Jamaica
- (vi) She was not in Antigua on May 31, 2018, and was not examined by a medical doctor in Antigua on that date. The doctor in Antigua had relied on the information provided by the doctor in Jamaica in issuing the Medical Leave Certificate
- (vii) While in Jamaica and after May 31, 2018 she did not contact her Employer.
- (viii) On July 15, 2018, she spoke with the Supervisor inquiring about her schedule and return to work and was informed that Mr. James would call her
- (ix) Having received no word from Mr. Brooks, she accepted her employment as having been repudiated

Discussion

17. We also carefully noted and considered the personal testimonies of the witnesses. Certain pertinent facts emerged during the cross-examination of the witnesses, which go to the root of the issues we are asked to determine. On a balance of probabilities, taking all the oral and documentary evidence as well as the closing submissions of Learned Counsel for the Employer and Learned Representatives for the Employee into account, our findings of fact include the following:

- (i) There is no evidence to support the Employee's contention that she had travelled to Jamaica for medical reasons. Before her travel, she had not secured any medical appointments.
- (ii) Having been informed that her vacation was approved until May 30, 2018, the Employee failed to make any adjustments to her return ticket
- (iii) On May 30, 2018, the Employee knew that she would not report for duty on May 31, 2018
- (iv) On May 30, 2018, the Employer contacted the Employee to remind her that she was scheduled to return to work on May 31, 2018. The Employee never contacted the Employer.
- (v) It was only then that the Employee informed the Employer that she was ill but failed to provide any information concerning the expiration of illness even when the Employer inquired

- (vi) While in Jamaica, she did not see a doctor until June 8, 2018, long after her vacation had expired
- (vii) The Employer attempted to contact the Employee on June 4 and June 6, 2018
- (viii) The evidence that the Employee was unable to communicate with the Employer is rejected. During her stay in Jamaica, the Employee maintained contact with her co-workers, who provided her with information regarding her schedule but failed to respond to the Employer's inquiry about the period of her illness and information that she had been scheduled to work.
- (ix) There was no evidence that the Employee communicated with the Employer after May 30, 2018, during her period of illness or upon her return to Antigua except for submitting the medical certificate to the Employer way out of time
- (x) The Employee was aware of the requirement to provide a medical certificate on the third day of being away from work due to illness in accordance with the Antigua and Barbuda Labour Code
- (xi) The Employee only provided a medical certificate when she returned to Antigua
- (xii) After receiving the medical certificate, the Employer attempted to reach the Employee but without success
- (xiii) Once she submitted the medical certificate on June 15, 2018, the Employee made no attempt to contact the Employer.

18. Learned Representative Mr. James argued that the Employer terminated the services of the Employee without formally communicating its position that it considered the Employee to have abandoned her job or that it dismissed the Employee for cause, having set out the reasons for the dismissal and after having allowed the Employee due process.

19. Section C16 (i) of the Antigua and Barbuda Labour Code states... " **said leave shall be taken only in connection with actual illness or any physical incapacitation for work, evidence of which in the form of a doctor's certificate or other satisfactory means, must be furnished by the involved employee to his employer on the third consecutive day of any such leave;**"

20. With Section C 16(i) in mind, it is noteworthy that the Employee provided no evidence to this Court that while she was in Jamaica, she had been ill.

21. Additionally, on the issue of the medical certificate subsequently produced by the Employee from the local doctor, we accept the evidence of the Employer that no reference was made to any medical certificate issued by any doctor in Jamaica on May 31, 2018, which determined the Employee to be unfit for work. The medical

certificate presented on the face of it and without more does not assist the Court as it purports that the Employee was medically examined on May 31, 2018, in Antigua by a medical practitioner when the Employee was, in fact, in Jamaica.

22. In any event, the Employee's evidence is that she did not see a doctor until June 8, 2018, long after she was required to produce the medical certificate indicating her illness as required by Section C16 (i) of the Labour Code. We, therefore, reject the Employee's evidence that she had a medical certificate issued by a doctor in Jamaica covering her illness from May 31, 2018.
23. We also found the Employee to be unreliable. The facts of this case suggest on a balance of probabilities that the Employee, having breached Section C16 (i) attempted to remedy the same by issuing a medical certificate from a local doctor long after it was due by law by an additional two (2) week period while she remained in Jamaica until the date she had originally planned. In our view, the medical certificate from the local doctor did not cure the Employee's breach.
24. Clearly, the Employer extended good faith to the Employee by giving her the benefit of the doubt that her absence was due to illness and rostering the Employee as being off sick for two weeks. We note and accept the evidence of the Employer's witnesses of the attempts by the Employer to reach the Employee. The Employer received no response from the Employee even after her return to Antigua.
25. Based on the evidence, particularly the Employee's testimony, it is clear that the Employee intended to go to Jamaica and remain there until June 14, 2018, irrespective of the fact that she was approved for vacation until May 30, 2018. We do not doubt that she consciously decided not to respond to the Employer's inquiries after May 30, 2018, and with the terms of her employment, which required her to either return to work after the second day of her illness or to provide a medical certificate for her absence. Upon her return, despite failing to properly account for her absence from May 31- June 14, 2018, she made no contact with the Employer.
26. Notably, in a medical leave context, employees on medical leave are not immune to abandonment where they fail to follow the provisions of the Labour Code and where there is no medical evidence available to support that an employee could not comply with these policies. Therefore, we believe the Employer had good reason to conclude that the Employee had abandoned her job.
27. Notwithstanding the good reason, the Employer was not diligent in informing and warning the Employee that her failure to return to work or provide a medical certificate for her absence would result in the Employer treating her employment as abandoned.

28. Abandonment of employment occurs when it is clear that an employee has no intention of returning to work. Despite the deliberate and conscious breach of the Labour Code by the Employee, the Employer was not able to convince us that the Employee had no intention of returning to work. Perhaps, had the Employer done more to communicate its position to the Employee and issued the very crucial warning, our conclusion would have been different. Ultimately, the evidence does not support a finding that the Employee abandoned her job.
29. The main consideration must now be whether or not, in the circumstances, the Employee was constructively dismissed and whether the dismissal was unfair. In paragraph 11 above, reference is made to Section C. 58 of the Labour Code, which sets out good cause for dismissal and tests for measuring the same. The Employer's evidence, as we understand it, is that it considered that the Employee had abandoned her job and, as such, removed her from schedule after July 11, 2018. However, we note that the Employee submitted the sick note to the Employer on July 15, 2018. This should have been an indication to the Employer that the Employee intended to return to work and still considered herself as employed.
30. During Mr. Brooks' cross-examination, he said he called the Employee several times but to no avail. When questioned by the Court, he stated he did not know where the Employee lived and had no other means of contacting her. We note, however, that the Employer was aware that the Employee worked at a credit union, yet no attempt was made to reach her there. In any event, the greater responsibility to have proper employee records falls on the Employer. The Employer also had the greater responsibility to ensure that it was clear that the Employee had no intention of returning to work before concluding that the Employee had abandoned her job.
31. The Employee gave evidence that she was waiting for a call from Mr. Brooks, but the call never came. Having not received any communication from the Employer, the Employee concluded she was constructively dismissed.
32. Having applied the principles in **Western Excavating (ECC) Ltd. v. Sharp [1978] 1 All ER 713**, we conclude that the Employee was constructively dismissed and unfairly dismissed.
33. Nonetheless, after careful consideration of all the facts and evidence, and for the reasons outlined in paragraphs 17-25 above, the Employee equally contributed to her dismissal. We therefore reduce her award for compensation by 50%.

The Award

34. We award compensation as follows:

Notice Pay

- (a) The Employee was paid weekly, earning an average of \$420.00 per week. She is, therefore, entitled to \$420.00 for notice pay, less 50% discount for her contribution. We therefore award the sum of **\$210.00** under this head.

Loss of Protection

- (b) The Employee worked for approximately 54 months. Her compensation under this head is equivalent to severance pay in the sum \$4,536.00, less 50% discount for contribution. She is, therefore, awarded the sum of **\$2,268.00**.

Immediate Loss

- (c) An award under this head takes into account the Employee's duty to mitigate her loss. The Employee, at all material times, was employed on a full-time basis by the St. John's Cooperative Credit Union. The Employee provided no evidence of any effort made to mitigate her loss. As such, we make no award under this head.

Pay in Lieu of Vacation

- (d) In its written submissions, the Employer conceded that the Employer is entitled to 12 days' vacation for the period 2015-2016. The Employee is, therefore, entitled to be paid the sum of **\$1,008.00** (\$84.00 x 12 days)

Order

35. It is hereby ordered that the Employer shall pay the Employee:

- (1) The total sum of **\$2,478.00** as compensation for unfair dismissal.
- (2) The sum of **\$1,008.00** for outstanding vacation.
- (3) The aggregate amount of **\$3,486.00** to be paid on or before March 15, 2024.

Dated this 15th day of February 2024.

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Samantha May-Francis
Vice President

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John R.H. Benjamin
Member

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Megan Samuel-Fields
Member