



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/34 of 2021

BETWEEN:

DONNA MAY PAYNE

Employee

and

DICKENSON BAY HOTEL MANAGEMENT LIMITED
t/a Sandals Grande Antigua Resort & Spa

Employer

Before:

The Hon. Samantha May- Francis

Vice President

Appearances:

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

2023: July 24
2024: December 13

JUDGMENT

*Ex Parte Trial- Employee sustained an injury to her knee in the course of employment-
Employer acknowledged injury as an occupational injury resulting in partial
permanent disability-Employer dismissed Employee based on prolonged illness-
Employer failed to file its Memorandum of Defence and to participate in trial-
Assessment of compensation if any due to the Employee*

May-Francis, VP:

Background

1. The Employee, by Reference No. 34 of 2022, filed on August 27, 2021, claims that the Employer unfairly dismissed her. She further claims that she is entitled to wages and compensation for the Employer's breach of contract. The Employee sets out her

claim in her Memorandum filed on August 27, 2021, her Witness Statement filed on February 17, 2022 and her oral evidence.

2. By Order of the Court dated November 11, 2021, the matter was set for ex parte trial as the Employer failed to file its Memorandum of Defence and Witness Statements. The matter was eventually listed for ex parte trial on July 24, 2023. The Employer did not attend the trial despite being served on June 21, 2023, with the Notice of Ex Parte Trial Date dated June 15, 2023. The Court proceeded to hear the matter in the Employer's absence, entered judgment on liability and considered the Employee's claim for compensation.
3. On July 24, 2023, the Court requested that Mr. Carty submit a Draft Order for further consideration of compensation. Having considered the contents of the Draft Order filed on July 26, 2023, the Court deemed it necessary to provide a written decision of its assessment of compensation.

Discussion

4. The Employee began working with the Employer on July 24, 2007, as a Room Attendant and continued in that position until her dismissal on January 30, 2010. The Employee worked a five-day work week and earned \$383.05 plus an average weekly service charge of \$360.00.
5. The Employee's position fell within the Bargaining Agreement between the Antigua and Barbuda Workers Union and the Antigua Hotels and Tourist Association, of which the Employer is a member.
6. The Employee contended that on August 16, 2007, she was injured while attempting to clean a ceiling fan in one of the rooms. She gave evidence of climbing onto the nightstand to clean the ceiling fan. She met this system of work when she commenced employment. The ceiling fans were not cleaned by the maintenance department but by the room attendants. The room attendants would climb onto the nightstand to reach the ceiling fan as they were not given any tools to aid in the cleaning of the same.
7. The Employee recounted that after banging her right knee on the nightstand, she fell and immediately felt immense pain. She was referred to the nurse on duty and was relieved for the rest of the day. The next day, although she reported for work, she could not complete her shift because of the injury. That same day, the Employer arranged for her to see Dr. Evan Moulon, who placed her on certified sick leave for two (2) weeks. Dr. Moulon referred her to orthopaedic surgeon Dr. K.K. Singh, who placed the Employee on additional certified sick leave. The Employee subsequently received several certified sick certificates from Dr. Singh.

8. While on sick leave, the Employer placed the Employee on temporary layoff on December 12, 2008. The Employee's evidence did not reveal whether she was placed on temporary layoff with or without a date of recall. Her Union intervened, and the Employer reversed the temporary layoff.
9. The Employee tendered into evidence Medical Reports from Dr. Singh dated March 12, 2009 and November 16, 2009. In his medical report of March 12, 2009, Dr. Singh diagnosed the Employee as having sustained an internal derangement to her right knee, which necessitated her having surgery in early 2009 in Trinidad performed by Dr. Derrick Lousaing, Orthopaedic Surgeon. Upon her return to Antigua, she continued to receive treatment under the care and supervision of Dr. Singh.
10. On January 30, 2010, after being on certified sick leave since August 16, 2007, the Employer informed the Employee that she had been dismissed effective January 19, 2010, due to her "continued absence from work and prolonged ill health", she was no longer fit to continue in her employment.
11. The Employee submitted her certified sick certificates to the Employer and was paid her wages. By November 16, 2009, Dr. Singh issued another medical report which was acknowledged by the Employer in the dismissal letter on January 30, 2010. It provided an evaluation of the Employee's permanent disability. The Court did not have the benefit of the Employer's evidence of its efforts to determine the effect the permanent partial disability would have on the Employee's ability to perform her duties.
12. It is noteworthy that Dr. Singh's medical report, dated November 16, 2009, did not indicate that the Employee could not continue in her employment. The Employee had, on January 11, 2010, before her dismissal, submitted a medical certificate that stated she was fit to return to work on February 22, 2010.
13. Based on the documentary evidence before the Court, despite the Employer's reliance on Section 16 (ii), in the absence of more evidence, the Court sees no basis on which the Employer could have formed the view on January 30, 2010, that the Employee was unable to resume her duties on February 22, 2010, as indicated by Dr. Singh.
14. Also, considering that the Employee's illness was account of her injury sustained at work by the unsafe system of work adopted by the Employer, additional steps needed to be taken by the Employer to ascertain the nature and extent of the disability and its effect of the Employee's ability to resume and perform her duties, before termination under C16 (ii). Consideration also needed be given to any other duties that could have been assigned to the Employee before dismissing her.

15. In any event judgment on liability having already been entered due to the Employer's default, the Court considered the following heads of compensation:

Loss of Protection

16. This is calculated similarly to severance pay. Section C41 of the Antigua and Barbuda Labour Code (the Labour Code) provides the minimum rate of one day's pay at the employee's basic wage for each month or a major fraction of his term of employment with his employer. The Employee was employed from July 24, 2007 to January 30, 2010. The Employee earned \$383.05 per week for a forty-hour workweek. Her daily rate is \$76.61. Despite the Employer stating in the dismissal letter that the Employee is due severance pay, the Employee's evidence is that she received no compensation but the \$15,000.00 from the insurance company for her injury. Accordingly, \$2,298.30 (30 days x \$76.61) is awarded for loss of protection.

Immediate loss

17. An unfairly dismissed employee is entitled to compensation for his loss immediately after the dismissal up to the date of judgment, provided he made adequate attempts to find employment. The Employee gave evidence that she could not work between the date of dismissal and the date of trial. On January 31, 2010, when the Employee received the dismissal letter, she had been on certified sick leave until February 22, 2010. On March 10, 2010, Dr. Singh, perhaps unaware that the Employee had already been dismissed, issued the Employee a sick certificate, placing her on certified sick leave until April 12, 2010.
18. Concerning the issue of mitigation, the Employee's evidence was that she could not work after her dismissal. The certified sick certificate issued by Dr. Singh and submitted by the Employee on March 10, 2010 supports, at the minimum, that the Employee was unfit to work until April 12, 2010.
19. The Employee's only evidence of mitigation was opening a small store at the Public Market in 2014, where she plied her trade selling toiletries and other personal care items. Her evidence is that she could not work most days due to her injury, she could not afford to hire someone, and she had to close down her store due to the complications she was experiencing. She contended that she could not be on her feet for long periods. A contention that is supported by the evidence.
20. The Employee also gave evidence that she could only open the store after receiving the \$15,000.00 payment from the Employer's insurance company seven (7) years after the injury and four (4) years after the dismissal. There was a significant delay in the Employee receiving that compensation, despite the Employer stating in the

dismissal letter that its insurance provider had already determined the amount of compensation to be paid to the Employee under the Workman's Compensation Act.

21. Considering the documentary evidence, particularly the sick certificate submitted by the Employee on January 11, 2010 and the sick certificate issued by Dr. Singh on March 10, 2010, the Court accepts the Employee's evidence that she could not readily mitigate her loss immediately following her dismissal. The occupational injury being at the core of the absences, which ultimately led to her dismissal, was also considered. Therefore, given the circumstances, three (3) months' salary in the sum of \$4,979.40 (1659.88 x 3) is awarded.

Notice Pay

22. The Employee is entitled to notice pay equivalent to her periodic pay. The Employee was paid weekly. Accordingly, she is awarded the sum of \$383.05 for pay in lieu of notice.

Future Loss

23. The Employee's evidence at trial was that she remains unemployed. Her evidence is that she has been unable to work since the accident. She relied on the medical report of Dr. Philmore Benjamin dated July 20, 2023. Dr. Benjamin reported that the Employee presented to him complaining of pain in her right knee, occasional swelling and difficulty ambulating. Upon his examination, the Employee's knee was swollen; she had difficulty flexing and pain on palpation.
24. The Court observed that the Employee walked with a limp. It is noteworthy that while the Court is cognizant of the difficult situation in which the Employee finds herself due to her injury, the statutory powers of this Court do not extend to an assessment of compensation for damages for personal injury, in particular loss of future earnings or earning capacity due to injury.
25. Apart from the evidence that she opened the store in 2014, the Employee gave no evidence of her efforts during the thirteen (13) years post dismissal to find even sedentary work in another field. This posed a difficulty for the Court to determine on a balance of probabilities that the Employee would continue to experience loss due to her dismissal.

Manner of Dismissal

26. There is no evidence to suggest that the Employer did anything to cause the Employee's reputation to be damaged or to make her less attractive to any other employer, thereby affecting her prospects of securing employment. The Employee gave no evidence of any attempt to find work and was rejected on account of something the Employer did. Therefore, no award is made under this head.

Exemplary Damages

27. Exemplary damages are recognised as a head of award. Section 10(5) of the Industrial Court Act provides that exemplary damages may be awarded in circumstances where "an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice". The statutory provision is clear and unambiguous and affords this Court the discretion to award exemplary damages.
28. In **Elliot Arnim Street v Caribbean Star Airlines Reference no. 19 of 2005**, this Court relied on the principles that -exemplary damages are to be awarded if the compensatory award is inadequate; the employee must have suffered punishable behaviour; the standard of proof is civil; the power to award exemplary damages should be used with restraint; the parties means are relevant; and awards should be moderate; determined that the compensatory award was inadequate and would not act as a deterrent to the employer and awarded exemplary damages to the employee.
29. Having assessed the compensatory award in this case and considering these same principles as laid down in the **Elliot Street** case, it has been determined that the compensatory award is inadequate and does not reflect the severity of the Employer's conduct, nor would it act as a deterrent.
30. The Antigua and Barbuda Labour Code, particularly Division D, obligates employers to provide a safe workplace and ensure employees' welfare, health and safety.
31. An employer that breaches Division D risks committing a criminal offence punishable by a fine and penalties for breaching its obligation. In the case at hand, the Employer acted in breach of its statutory obligation by failing to ensure the welfare and safety of the Employee. The Employer failed to provide the Employee with the necessary tools needed to execute her duty of cleaning the ceiling fan – the unsafe system of work adopted by the Employer resulted in injury to the Employee.
32. Additionally, at common law, employers have a duty to take reasonable care for their employees' safety in all employment circumstances. The duty to provide a safe workplace relates to an employer's responsibility imposed by common law.
33. On another note, the Employer stated the Employee would be paid her severance pay, one week's wage in lieu of notice and her pension contributions. However, the Employee's evidence is that after her dismissal, she did not receive any payment from the Employer except a single payment of \$15,000.00 through the Insurance Company on April 8, 2014, seven (7) years after injury and four (4) years after being dismissed. The Employee ought to have received her severance regarding the

reason given for her dismissal and pursuant to Section C16 (ii) of the Labour Code. Regarding the Employer's ground for dismissal, the failure to pay the Employee her terminal benefits in itself constituted an aggravating factor and compounded the effects of the dismissal on the Employee.

34. The Employer dismissed the Employee without any warning that it was concerned about the level of her absences and while she was still on sick leave in the face of a certified sick certificate indicating that she was fit to resume her employment. When the dismissal letter was issued to the Employee, the Employer had no medical report to determine that the Employee was unfit to continue in her employment on February 22, 2009. According to the Employee, there was very little communication concerning her progress and return to work. The Employer did not offer her alternative sedentary work before dismissing her. Based on this evidence it is reasonable to conclude that the Employer's dismissal of the Employee was motivated by the need to discontinue payment of the Employee's wages.

35. Therefore, considering the established principles set out in the previous authorities, Section 10 (5) of the Industrial Court Act, the Antigua and Barbuda Labour Code- Division D and the facts and evidence of this case, an award of exemplary damages is justified. The dismissal was harsh and oppressive, considering its grave effect on the Employee through no fault of hers, and the totality of the Employer's actions contravened good industrial relations practices on the whole.

36. In **Stanford Financial Group v Leslie Hoffman Civil Appeal No. 2 of 2002**, the Court of Appeal upheld an award of \$30,000.00 for exemplary damages by this Court. Having carefully applied the discretion given under section 10 (5) of the Act, I believe that an award of \$20,000.00 to the Employee is justifiable based on the facts of this case.

37. Costs

Regarding provisions of section 10 (2) of the Industrial Court Act and for the same reasons stated above I award the sum of \$1,500.00 costs.

38. Order

In the premises, it is ordered that:

- (i) The Employer shall pay compensation for unfair dismissal to the Employee in the aggregate sum of **\$29,160.75** comprised as follows:

Loss of Protection	\$ 2,298.30
Notice Pay	\$ 383.05
Immediate Loss	\$ 4,979. 40

Exemplary Damages	\$ 20,000.00
Costs	<u>\$ 1,500.00</u>
TOTAL	\$29,160.75

- (ii) The Employer shall pay the Employee the sum of \$29,160.75 on or before the 31st day of January, 2025.

Dated this the 13th day of December, 2024



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Samantha May-Francis
Vice President

