

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/48 of 2019

BETWEEN:

NORKESA THOMAS

Employee

And

A.S. BRYDEN & SONS (ANTIGUA) LTD

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. John H. R. Benjamin

Member

Appearances:

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

Ms. E. Ann Henry EC of Henry & Burnette, Attorneys-at-Law, for the Employer

2023: April 18

2024: March 1

Section C 16 of the Labour Code- Employee with duties to lift heavy weights sustaining occupational injury- Medical doctor diagnosing unrelated medical condition, advising risk of aggravating or worsening the condition and recommending employee be relieved of duties- Employer engaging Employee in negotiation for a mutual separation package to take effect on a specific date- Employer abandoning negotiations after the specific date and unilaterally determining terms of termination of employment- Statement of termination relying on Section C 16 of Labour Code disclosing no precise reason and asserting retrospective termination date- Whether Employee unfairly dismissed.

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JUDGMENT

Brown, P

Background Facts

1. As a result of medical advice received by it in respect of the medical condition of the Employee, by letter dated January 17, 2019, the Employer proposed a severance package to the Employee in the total sum of \$8,796.97 with a termination date of January 31, 2019. It was an express term of the Employer's Offer of Severance" that upon receipt of her acceptance "a separate agreement would be drawn up".



2. The Employee did not accept the offer and retained her trade union Representative to negotiate a more lucrative package. As stated in her Representative's letter dated January 27, 2019, the Employee submitted a counter-proposal including amounts for notice pay, severance pay, fringe benefits and a global sum for medical expenses. By that letter, the Employee specifically requested a "timely reply" before the proposed separation date of January 31, 2019.
3. By letter dated February 07, 2019, addressed to the Representative, the Employer revised its offer upwards by \$15,000.00 to make a total sum of \$23,796.97 payable in 4 equal monthly installments. The Employer's letter expressly stipulated that if the Employee did not accept the revised offer within 7 days, it would rescind the offer of the separation package and revert to the legal entitlement of severance under its collective agreement with the Antigua Trades and Labour Union.
4. In response, by letter dated February 17, 2019, the Employee's Representative proposed a total sum of \$28,578.54, inclusive of the Employer's additional offer of \$15,000.00. In particular, the Representative proposed that the effective separation date be February 28, 2019, and that the Employee be paid in lieu of accrued vacation and notice. Moreover, the Employee requested that she be paid a first instalment of \$10,000.00 on February 28, 2019 and the balance by two equal monthly instalments in the ensuing months.
5. In its letter dated February 20, 2019, addressed directly to the Employee under the heading 'Termination of Employment', the Employer informed her that her separation package for her severance "which took effect on the 31st January 2019" would be paid in full on February 28, 2019. And that the same would total \$11,819.67 inclusive of the initial offer of \$8,798.97 as severance; the sum of \$1,869 as vacation pay; and \$1,153.70 as notice pay.
6. By letter dated February 25, 2019, addressed to the Representative, the Employer formally rejected the Employee's counter-proposal.
7. By letter dated February 27, 2019, the Employee's Representative took issue with the Employer's letter of termination referred to at paragraph 5 above, which sought to fix the date of termination retrospectively at January 31, 2019. Moreover, the Representative took issue with the content of the termination letter contending that it did not include a "precise reason" as required under section C 10 of the Labour Code.
8. On February 28, 2019, as advised by her Representatives, the Employee accepted the said sum of \$11,819.67, without prejudice to her right to claim additional sums for unfair dismissal.

The Opposing Case

9. In her Reference commencing these proceedings, the Employee raised the joint issues of constructive and unfair dismissal. In her Memorandum of Claim, she established the historical perspective starting with the injury which she sustained in the course of her employment. In its letter instructing the Employee to go to Dr. Adama Francis for treatment, the Employer stated:

"Of specific interest to me is whether she is fit to perform her duties as a Merchandiser, which requires the ability to lift heavy weight (up to 50LBS) as part of her normal duties."

10. Acting on the Employer's instructions, the Employee consulted with Dr. Adama Francis who diagnosed that she had suffered (a) soft tissue injury and a muscular strain. In addition, Dr. Francis diagnosed that the Employee was suffering from "moderate scoliosis" for "some time now". The latter diagnosis was unrelated to the occupational injury. In her report dated October 10, 2018 the doctor concluded:

"It is my opinion that lifting weights could aggravate or even worsen this condition. It would be advisable that the patient be relieved of these duties or maybe assigned other duties that are less stressful on the spine."

11. Further in her Memorandum the Employee contended that the medical report does not justify her dismissal under Section C 16 of the Labour Code. In particular, the Employee contended that the Employer wrongfully concluded that:

- (a) As a result of her medical condition, she could no longer perform her duties;
- (b) There was no alternative position in the company for her to remain employed;
- (c) The dismissal letter does not meet the requirements of Section C 10 of the Labour Code; and
- (d) Under the circumstances, the Employer's dismissal of the Employee was contrary to good industrial relations, unreasonable, harsh and oppressive.

12. The nub of the Employer's case is that the Employee was severed pursuant to Section C 16 of the Labour Code and therefore, she was not unfairly dismissed.

13. The Employer contended that:

In light of:

- (a) The Employee's job requirement for her to lift "heavy weights";
- (b) Dr. Francis' diagnosis of moderate scoliosis and her advice that lifting heavy weights can aggravate or worsen the Employee's condition;

(c) The Employer's determination that there was no other suitable position to which the Employee could be transferred, it was reasonable to advise the Employee that she would have to be severed in accordance with Section C 16 of the Labour Code.

14. Further, the Employer maintained that as early as October 2018, it made it clear to the Employee that her services would be terminated, and as early as January 17, 2019 that the severance would take effect from January 31, 2019.
15. Ultimately, on February 28, 2019, the Employer paid the total net sum of \$11,819.67 to the Employee in accordance with the terms of the Collective Agreement and contended that she is not entitled to any further payment.

Analysis

16. Since the Employee raised the issue of unfair dismissal, we are obligated to have regard for the legal framework established in Part 5 of the Labour Code. Essentially, in safeguarding the Employer's right not to be unfairly dismissed, as provided in Section C 56, our analysis is largely circumscribed by the provisions of Section C 58. Similarly, since the Employer relies on section C 16, we are also obligated to have due regard for the pertinent provisions.
17. In sequence, the Employer's paramount statutory obligation arising from Section C 10 (1) is the timely issuance - with 7 day of the termination or notice thereof - of written statement of the precise reason for the termination.
18. Once the Employer crosses the C 10 threshold, its second statutory obligation, which is most crucial at trial, is to establish by positive evidence that the reason stated in the statutory statement falls under one of the five statutory categories provided in Section C 58(1) and that it has a sound factual basis for the same.
19. Thirdly, the evidentiary burden on the Employer does not end at subsection C 58(1), it extends conjointly to Section C 58(2) which requires it to pass the test of reasonableness by proving that it acted reasonably under the circumstances.
20. There is nothing in section C 16 which relieves or exempts an employer, wishing to rely on that section, from the requirements of section C 58. In fact, section C 58 (1) (e) provides for "prolonged illness or some other substantial reason" to be named as a "good cause" for dismissal. Thus, in cases where illness or a specific medical condition is the reason for the dismissal, the employer must prove the factual basis of the same under that subsection; and also prove that it acted reasonably, under the circumstances, pursuant to subsection C 58 (2).

21. Accordingly, the evidentiary burden on the Employer requires it succeed at all three stages. If it fails at any of the three stages in sequence, the dismissal will be deemed to be unfair. In other words, in order to prove that the dismissal was not unfair, it must prove by positive evidence that it discharged all the pertinent statutory obligations at each of the three stages.
22. Where, as in this case, the Employer admits to the termination of the services of the Employee, the burden is on the Employer to prove that the dismissal was not unfair. In this case, the burden arises although the Employer refrained from using the term dismissal and stuck with the terms "termination" and "severance" in its stead. In the first paragraph of its letter dated February 20, 2019, under the heading "Termination of Employment" the Employer makes it clear that it unilaterally implemented the Employee's "severance which took effect on January 31, 2019". Further, in the second sentence, the Employer asserted that the Employee's "termination benefits were outlined" in the letter dated January 17, 2019. Moreover, the Employer definitively set out the constitution of the termination package totaling \$11, 819.67.
23. It is noteworthy that in order to be legally sound and efficacious, the "Termination of Employment" letter relies on the "Offer of Severance" letter written almost one month earlier. In effect, the "termination" letter sought to import the content of the "offer" letter.
24. In the final analysis, given the Employer's obvious intention, the "termination" letter is in effect a "dismissal" letter. Unfortunately, it is fatally flawed on at least two grounds. Firstly, it fails to state the precise reason for the dismissal or the termination of the Employee's services. In relation to that failure, it is important to note that the advent of the amendment to Section C 10 of the Labour Code in 1998 hark back to the judgment in **Privy Council Appeal No. 51 of 1995: Margaret Beazley et al v Benjies Business Centre** in which it was held, in effect, that previous notification to an employee by written or oral communication as to the reason for the dismissal was of no moment. As codified in section C 10, it is mandatory that the precise reason be stated in the dismissal letter.
25. Similarly challenging is the Employer's attempt to issue the letter of termination with retrospective effect to the January 31, 2019. Based on the facts of this case, that attempt is illogical and untenable. Moreover, it offends the spirit and letter of section C 9 which provides for an employer's obligation to give notice to the employee of its intention to terminate his employment.
26. The legal effect of the foregoing is that the Employer is caught out by Section C 10 (4) which effectively estops it from introducing any testimony at trial as to

the facts which might have been recited in the termination letter. On the strict application of that subsection, the Employee's previous knowledge of the factual basis for the Employer's offer of severance and the termination is irrelevant.

27. In the circumstances, the Employer has failed to meet the threshold established by section C 10. As a result, the dismissal is deemed to be unfair by reason of the estoppel pursuant to section C 10 (4). It follows that the Employer has failed to establish a reason with sound factual basis for the dismissal under section C 58 (1) (e) or at all.
28. For completeness, we turn our attention to section C 58 (2) of the Labour Code towards determination of the reasonableness or unreasonableness of the Employer's action in dismissing the Employee as it did under the circumstances. In that regard, we are mindful that even if the Employer had been successful in relation to the content of the dismissal letter and proving the necessary factual basis of the reason for the dismissal, the ultimate test is whether the Employer acted reasonably or unreasonably, under the circumstances.
29. The background facts summarized above reveal that the Employer had the foundation grounded in Section C 16 (iii) for a potentially good reason for the dismissal and the discharge of its statutory and evidentiary obligations.
30. As to whether the Employer acted reasonably or unreasonably under the circumstances, consideration of a summary of selected aspects of its actions will suffice for present purposes:
 - a) Having received the advice of Dr. Francis in relation to the Employee's medical condition and having no suitable alternative position, the Employer decided that it was in the mutual best interest of the parties that they agree the terms under which the employment relationship would end. The first specific item proposed by the Employer towards mutual separation was that the employment relationship would end on January 31, 2019. However, the parties continued to exchange correspondence up to February 20, 2019, when by its termination letter the Employer asserted that the severance took effect on January 31, 2019. Given the evolution of the situation, it is our opinion that it was unreasonable for the Employer to insist that the employment relationship ended on that date. In our opinion, notwithstanding the Employer's intimation that the Employee was not required to report for work after January 31, 2019, while the negotiations were ongoing, the employment relationship continued until February 28, 2019 when the Employee received the severance package, not as agreed but as determined unilaterally by the Employer.

- b) The evidence reveals that the Employer was still actively engaged in negotiations with the Employee up to February 18, 2019. This is evidenced by its letter bearing that date, to the Employee's Representative in which it expressly looked forward to an agreement after which a Release would be prepared to consummate the transaction. Despite that letter, the Employer wrote directly to the Employee two days later stating that the negotiations resulted in "certain changes" to her termination benefits. As a result of the changes, the Employer unilaterally fixed the termination package and the date for payment of the same. It is obvious from the letters including the Employer's letter dated February 25, 2019, that the Employer failed or refused to inform the Employee and/or her Representative that it had earlier rejected their last proposal and abruptly ended the negotiations. In our opinion, that latter action by the Employer was unreasonable in the circumstances.
- c) More fundamentally, the Employer appears to have taken an equivocal approach towards the termination of the employment relationship. Firstly, the Employer appeared to have deliberately taken the steps to (a) underscore the good relations which it "always enjoyed" with the Employee; (b) inform the Employee's previous Union Representative of the situation with a view to getting his concurrence; and (c) continued the employment relationship after October 2018 on humanitarian grounds (d) engaged in the negotiations which transpired with the Employee's successor representative. In the circumstances, to abruptly reject the Employee's last proposal and be intransigent about the stance it took was unreasonable and distasteful.

31. By reason of the several matters aforesaid, we conclude that the Employee was unfairly dismissed and is entitled to compensation, which we assess as follows.

Compensation

32. We award compensation under the following customary headings:

- a) Notice Pay

As at February 28, 2019 when the employment relationship ended, the Employee was last paid for the month of January 2019 and received no proper notice of her termination. What she received earlier was notice of a proposed termination date as part of the offer of a mutually agreed severance package. In the circumstances, we award the sum of **\$3,074.27**, the equivalent of one month's salary plus her contractual travel allowance.

- b) Loss of Protection

Since the Employee worked from January 2, 2014 to February 28, 2019, a total of 5.16 years, we award the sum of **\$12,895.71**, ($\$2,499.17 \times 5.16$) calculated at the rate of one month's pay for each year of service.

c) Immediate Loss

Based on the Employee's successful efforts to negotiate her loss immediately after her dismissal, we limit the award under this heading to **\$3,450.00** the equivalent of her contractual travel allowance for 6 months.

d) Bonus and Exemplary damages

The evidence does not support any award under these headings.

Costs

33. Having regard to the Employer's successful application to vary the order dated June 15, 2020 for an ex parte trial, we award costs to the Employee in the sum of **\$500.00**.

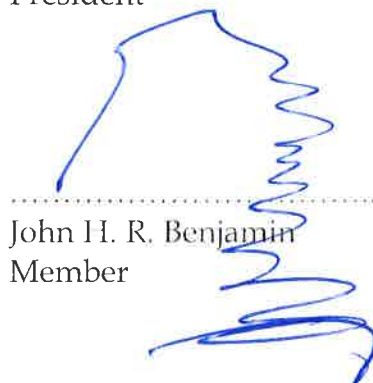
Order

34. Taking into consideration the fact that the sum of \$11,726.76 paid to the Employee included the sum of \$1,869.11 for Vacation Pay, we order that:
(1) The Employer shall pay the total sum of \$10,062.30 [$\$19,919.98 - (\$11,726.79 - \$1,869.11)$] to the Employee, as net compensation (\$9,562.30) for her unfair dismissal plus costs (\$500.00), no later than March 30, 2024.

Dated this 01st day of March 2024.



Charlesworth O. D. Brown
President



John H. R. Benjamin
Member