

File
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ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/13 of 2016

BETWEEN:

DONOVAN ANDERSON

Employee

and

PHILLIP SHOUL

Employer

Before:

The Hon. Samantha May- Francis

The Hon. John Benjamin

Vice President

Member

Appearances:

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

Mrs. Alincia Williams-Grant Law Chambers, Attorneys-at-Law for the Employer

2021: June

2022: November 17

2023: October 13

*Unfair Dismissal - Did the Employer dismiss the Employee - Was the dismissal unfair-
Section C10 (4) of the Labour Code -Whether the Employer is estopped from giving
evidence as to the reasons for the dismissal - Compensation if any, due to the Employee*

JUDGMENT

Introduction

1. The Employee is a national of Jamaica who worked in the Employer's household as a Gardener. He was dismissed on July 9, 2015, for failing to carry out his duties. By Reference, filed on February 2, 2016, he brought a claim against the Employer for unfair dismissal.

The Alleged Facts

2. The Employee alleges the following facts:

- (i) He was first hired in 2006 as a Gardener but did not obtain a work permit until September 5, 2007.
- (ii) He earned \$455.00 weekly and a \$30.00 travel allowance. He also received a bonus for each year of employment except for one year.
- (iii) During his employment, he was issued a job description on three occasions- October 9, 2012, July 24, 2014, and January 15, 2015. From time to time, he was instructed to carry additional duties which were not part of his job description, including painting, cleaning the Employer's boat, power washing and cleaning the verandah's ceiling on the Employer's residence and wiping ceilings and rails.
- (iv) He was paid \$80.00 for washing the Employer's boat and \$200.00 for painting an apartment on the property.
- (v) A few days before his dismissal, the Employer instructed him through another employee to paint the wall portion of the perimeter fence. He refused to do so. On the morning of July 9, 2015, anticipating that the Employer would address his refusal, he activated the recording feature on his cellular phone to record the conversation between him and the Employer.
- (vi) Having refused to paint the wall, the Employer dismissed him, threatened to cause him harm and ordered him off his property. He was not issued a termination letter or provided reasons for his termination.
- (vii) Following his dismissal, he sought the assistance of Mr. Chester Hughes of the Antigua and Barbuda Workers Union. The Employer offered reinstatement, but in light of the threats received, in fear for his safety, he refused the offer of reinstatement.

3. In his defence, the Employer denies having unfairly dismissed the Employee and contends:

- (i) He first engaged the Employee in December 2007 after his work permit was approved.
- (ii) The Employee's duties included cutting the grass, landscaping and grooming hedges and other responsibilities related to the position as set out in his job description. The Employee was paid for any other task he performed which was outside the scope of his normal duties.
- (iii) The Employee earned \$455.00 gross pay per week and worked a five-day workweek.
- (iv) On July 9, 2016, the Employee refused to carry out several outstanding tasks and having felt threatened, he asked the Employee to leave.
- (v) The Employee was asked to return to work but refused.

Issues

4. The main issue for our consideration is whether or not the Employee was unfairly dismissed.

Discussion

5. Mr. Samuel James, the Employee's Representative, submitted that judgment should be entered on liability against the Employers according to Sections C10 (1) and C10 (4) of the Antigua and Barbuda Labour Code (the Labour Code). Mr. James submitted that the Employer dismissed the Employee and failed to provide the precise reason(s) as provided by Section C10 (1) of the Labour Code and, therefore, he should be estopped from adducing evidence at trial regarding any such reason(s) in accordance with Section C10 (4) of the Labour Code, which reads:

Section C10 (1)

"Upon termination by an employer of an employee's employment subsequent to the latter's probation period, the employer shall within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reasons for the termination".

Section C10 (4)

"An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate in any proceeding testing the fairness of the dismissal or his liability for severance whichever is applicable".

6. The Employer's evidence is that he did not dismiss the Employee. He admitted that matters escalated on the morning of July 9, 2016, and the employment relationship quickly deteriorated. He gave evidence that immediately following the incident, having had a chance to reflect, and Mr. Chester Hughes, the Employee's then Representative, having intervened, he immediately offered the Employee to return to work. Furthermore, even if he had dismissed the Employee, which he denies, he had not intentionally breached Section C10 (1), as he was in discussions with Mr. Hughes, who, although representing the Employee, was attempting to repair the good family-like relation they had enjoyed over the years.
7. Mr. Hughes was called as a witness for the Employer. He gave evidence to support the Employer's case to the extent that he was trying to repair the employment relationship or at least resolve the issues surrounding and resulting from the Employee's dismissal amicably. However, Mr. Hughes testified that he met with the Employer on July 9, 2015, the same day the Employee consulted with him. He further testified that during the meeting with the Employer, the Employer admitted dismissing the Employee and agreed to issue a dismissal letter.

8. Mr. Hughes then met with the Parties on July 16, 2015, where they were allowed to provide their version of events. Having already accepted that he had dismissed the Employee, the Employer offered the Employee to be reinstated. Mr. Hughes' evidence is that the Employee refused the offer of reinstatement, which he communicated to the Employer and his then Representative, Mr. Anderson Bass. He advised them that the Employee wished to be compensated for unfair dismissal. He gave evidence that before he could submit the Employee's proposal for compensation, the Employee had moved on and was represented by now Representative Mr. Samuel James.
9. Having had the benefit of the video recording, it is evident on the morning of July 9, 2015, there was an altercation between the Employee and Employer, which unfortunately escalated to the point that the Employee was dismissed. We do not doubt that the Employer dismissed the Employee, as we clearly saw and heard him doing so from the video evidence.
10. In considering Mr. James' submission, we reminded ourselves of the decision of **Berridge & Others v Benjies Centre (Antigua and Barbuda) Privy Council Appeal No 51 of 1995**, in which Lord Hoffman stated, "...the purpose of Section C10 is not merely to ensure that an employee is given reasons for the termination of his employment. It requires those giving the reasons to be given in a form which can be readily identified for the purposes of any subsequent proceedings "testing the fairness of the dismissal". The reason why they need to be capable of identification as formal statutory reasons is that in such proceedings, the employer is "conclusively bound" by the statutory reasons (subsection (3)) but not by any other reasons which he may have given. Likewise he is estopped by subsection (4) from introducing testimony of facts which could have been included in the statutory reasons."
11. We note that Mr. James did not raise the breach of Section C10 as a preliminary point at trial. However, in our consideration of this matter, Section C10 remains relevant. Therefore, based on the decision of **Berridge** and the overarching statutory provisions of Section 10(4), we agree with Mr. James that no precise reason was given to the Employee within seven (7) days of his dismissal meaning that the Employer failed to meet the statutory requirements of Section C10(4). We also agree with Mr. James that irrespective of the discussions with Mr. Chester Hughes, the Employer remained obligated to follow the provisions of the Labour Code. The ongoing discussions with Mr. Hughes cannot absolve the duty imposed by Section C10 (1). As such, the consequence is that we cannot now consider the Employer's evidence as to the precise reasons for and the fairness of the dismissal; the Employer is estopped.

12. We, therefore, find the Employee to have been unfairly dismissed. We now proceed to address the issue of compensation to the Employee.

Compensation

13. We have already determined that the dismissal was unfair. Therefore, the issue remaining for consideration by this Court is the amount of compensation to be paid to the Employee. Accordingly, we considered the following heads of compensation.

(a) Loss of Job Protection:

This is similar to severance. The Employee gave evidence that he was employed by the Employer herein in 2006 before obtaining a work permit in September 2007. The Employer disputes this and provides evidence that the Employee commenced employment in December 2007. In assessing the Employee's loss of protection, we reminded ourselves of the provisions of Section F4 of the Labour Code, which prohibits employment by someone who is not a citizen of Antigua and Barbuda without a work permit. If the circumstances were as contended by the Employee, we are not minded to grant the Employee any benefit for his clear breach of the law as he knowingly engaged in employment knowing that he required a work permit. Therefore, we accept that the Employee commenced his employment in December 2007.

The evidence from both parties is that the Employee earned \$455.00 over a five-day workweek. He worked from December 2007 until he was dismissed on July 9, 2015, for ninety (90) months at a daily rate of \$91.00.

Section C41 of 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. He is therefore entitled to compensation of **\$8,190.00.**

(b) Pay in Lieu of Notice:

The Employee is also entitled to receive Notice Pay in accordance with his pay interval. We, therefore, award one week's notice pay in the sum of **\$455.00.**

(c) Immediate Loss of Earnings:

The Employee testified that he first found work painting with Tommy Joseph and earned \$1,000.00 per week after being dismissed and was also working with Mouse simultaneously. He could not recall how long after but said it was after he received his temporary residence but also could not remember when he received the same. He then worked with Mr. Daley and earned \$800.00 a week. After being dismissed, the Employee earned approximately twice as much as he enjoyed with the

Employer. Based on the evidence of mitigation and submissions, nothing came forth to suggest that the Employee was unemployed for any significant time. As such, we award eight (8) weeks' pay of \$3,640.00 and allowances of \$240.00 in the sum of **\$3,880.00**.

Award

14. The Employee is entitled to compensation of **\$12,525.00** broken down as follows:

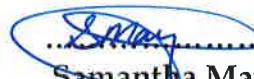
Loss of Protection	\$ 8,190.00
Notice Pay	\$ 455.00
Immediate loss	\$ 3,880.00

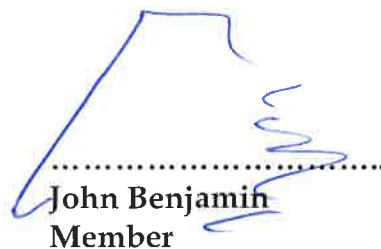
Order

The Employer shall pay the Employee the sum of **\$12,525.00** as and for compensation on or before November 13, 2023.

We note the inordinate delay in the trial of this matter. A review of the Court's record showed that trial dates scheduled for this matter were vacated on five (5) occasions, between June 26, 2017, when the matter was first listed for trial and November 17, 2022, when the trial was completed. The Court's record also revealed that the trial dates were vacated primarily due to the unavailability of the Employer and his Counsel. We, therefore, profoundly regret and apologise for the further delay in delivering this judgment, as it is not the Court's wish to delay justice.

Dated this 13th day of October, 2023


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Samantha May-Francis
Vice-President


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John Benjamin
Member