



EMPLOYMENT RIGHTS TRIBUNAL

Case: ERT/2014/033

JASMINE PAYNE

CLAIMANT

AND

BARBADOS VOCATIONAL TRAINING BOARD

RESPONDENT

DATES: April 13, 2016; April 15, 2016; July 11, 2016; July 19, 2016; August 22, 2016, August 23, 2016, August 24, 2016, August 29, 2016, August 30, 2016 August 31, 2016, September 26, 2016, September 27, 2016, February 23, 2017, February 27, 2017, March 6, 2017, May 23, 2017, June 16, 2017 and August 8, 2017

BEFORE: Mr. Omari Drakes, Mr. Frederick Forde, Dr. Hartley Richards

APPEARANCES: Ms Tricia Watson for the Claimant
Mr. Vincent Watson for the Respondent

INTRODUCTION

[1] This is a claim of unfair dismissal made pursuant to Section 32 (1) of the **Employment Rights Act – 2012 (the “Employment Rights Act”)** by Jasmine Payne (the “Claimant”) against her former employer the Barbados Vocational Training Board (the “Respondent”) following the Claimant’s dismissal on October 31, 2013.

FACTS

[2] The Claimant was employed by the Respondent pursuant to two separate fixed term contracts. The said fixed term contracts were for the periods November 1, 2011 to October 31, 2012 and November 1, 2012 to October 31, 2013.

[3] The Respondent failed to renew the Claimant’s contract after October 31, 2013. The failure to renew the Claimant’s contract amounts to a dismissal. The Claimant was therefore dismissed by the Respondent on October 31, 2013.

[4] The Respondent relied on not less than seven (7) reasons for its decision not to renew the Claimant’s fixed term contract. Yet, the Respondent failed to properly establish the principal reason for its decision not to renew the Claimant’s fixed term contract. As a result of the

Respondent's failure to properly establish the principal reason for its decision not to renew the Claimant's fixed term contract, it was left to the Tribunal to establish the said principal reason. The Tribunal finds that the principal reason for the Claimant's dismissal was as a result of a clash of personalities.

- [5] Tribunal further finds that this clash of personalities was not of a kind such as to justify the Respondent's decision not to renew the Claimant's fixed term contract. The Claimant was therefore unfairly dismissed by the Respondent.

THE ISSUES

- [6] The Claimant, who was employed by the Respondent as Public Relations/Marketing Officer claims that she was unfairly dismissed by the Respondent and seeks relief. The Respondent contended that it had just cause not to renew the Claimant's contract and was also of the view that any procedural failings by the Respondent could be remedied with nominal damages.

- [7] The issues for the Tribunal to determine were:
- a. Did the Claimant have a right not to be unfairly dismissed?
 - b. What was the effect of the Respondent's failure to renew the Claimant's contract after October 31, 2013?
 - c. Was the Claimant unfairly dismissed?
 - d. What was the principal reason for the Respondent's failure to renew the Claimant's contract after October 31, 2013?
 - e. If the Claimant was unfairly dismissed, what is the appropriate remedy?

DISCUSSION

Did the Claimant have a right not to be unfairly dismissed?

- [8] Pursuant to section 27 of the **Employment Rights Act 2012 – 9** (the "Act"):

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part.

(3) Subsection (1) does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.

- [9] The evidence of the Claimant (Exhibits 1) and the Respondent (Exhibit HT 6) shows that the Claimant was engaged by the Respondent in the role of Public Relations/Marketing Officer on or

about November 1, 2011 pursuant to the terms outlined in an “Offer of Temporary Appointment” dated October 28, 2011 (the “First Temporary Appointment”). The First Temporary Appointment was for the period November 1, 2011 to October 31, 2012. Thereafter, the evidence of the Claimant (Exhibits 2) and the Respondent (Exhibit HT 7) show that on or about November 1, 2012, the Claimant’s engagement was continued pursuant to terms outlined in a second “Offer of Temporary Appointment” dated November 2, 2012 (the “Second Temporary Appointment”).

[10] Pursuant to the provisions of Section 4 (5) of the **Act**:

Short-term contracts granted to an employee in succession at intervals of less than 42 days count for the purpose of calculating his period of continuous employment.

[11] The Tribunal therefore finds that the Claimant was continuously employed by the Respondent from November 1, 2011 to October 31, 2013 at which time her contract was not renewed. She has therefore met the requirements of Section 27 of the Act.

[12] In the circumstances, the Claimant had a right not to be unfairly dismissed by the Respondent.

What was the effect of the Respondent’s failure to renew the Claimant’s contract after October 31, 2013?

[13] The undisputed facts of this case are that by letter dated September 26, 2013 (Claimant’s Exhibit 3) the Respondent informed the Claimant that it had determined that her temporary appointment would not be extended or renewed.

[14] Pursuant to Section 26 (1) (b) of the **Act**:

For the purposes of the Part an employee is dismissed by his employer where

(b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract.

[15] To the extent that the Claimant was given notice that her contract would not be renewed, the Tribunal finds that she was dismissed pursuant to the provisions of Section 26 (1) (b) of the **Act**.

Was the Claimant unfairly dismissed?

[16] Section 29 of the **Employment Rights Act** states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

(a) the reason, or, if more than one, the principal reason, for the dismissal; and

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

[17] Pursuant to Section 29 (1) of the **Act** the burden to show that a dismissal was fair rests with the employer.

[18] On May 23, 2017 during the course of the hearing, Counsel for the Respondent conceded that the Claimant was unfairly dismissed. In the circumstances, the burden at Section 29 (1) of the **Act** was not discharged. Therefore the Tribunal was left with no alternative but to conclude that the Claimant's dismissal was unfair.

[19] That being the case, the Tribunal was of the view that determining what the principal reason for the dismissal was remained a live issue to be determined. This is because the Tribunal considered this to be a critical factor in determining the appropriate award to grant to the Claimant.

What was the principal reason for the Respondent's failure to renew the Claimant's contract after October 31, 2013?

[20] **Turner v Wadham Stringer Commercials (Portsmouth) Ltd [1947] ICR 277, [1947] IRLR 83, National Industrial Relations Court** is authority for the principle that to determine the reason for dismissal, the Tribunal must examine all the circumstances of the case rather than 'the reason' which immediately precipitates the dismissal, which may be triggered by a quite trivial matter.

[21] According to the Statement of Henderson Thompson, the Respondent took 8 factors into consideration when it decided not to renew the Claimant's contract. These were:

- i. The Claimant's conduct / attitude towards other staff members and management;
- ii. An incident that occurred involving the Crane Resort;
- iii. The Claimant's conduct at a meeting with the TVET Council in March 2013;
- iv. The Claimant's failure and/or refusal to complete the tasks of preparing and editing "organizational publications for internal and external audiences including quarterly newsletters and annual reports in keeping with the terms and conditions of her contract
- v. The Claimant's failure to follow instructions in relation to having a Billboard prepared by Dynamic Colour;
- vi. The Claimant's failure and/or refusal to follow the Board's accounting procedure before giving instructions to the Advocate and Nation newspapers to publish articles; and
- vii. The Claimant's lack of appropriate qualifications.

[22] The Tribunal finds that on the balance of probabilities each of these factors would have influenced the Respondent when determining not to renew the Claimant's contract, but of these 8 factors/reasons the Tribunal must determine what was the principal reason.

[23] Of the factors/reasons listed, much emphasis was placed on the Claimant's lack of appropriate qualifications. Indeed, the Director of the Respondent Mr. Thompson indicated in his evidence that based on the Respondent's standards, the Claimant was not qualified to be a Public Relations/Marketing Officer but was instead qualified to be a receptionist or clerical officer. On the face of it the Claimant's qualifications would appear to have been the principle factor/reason for the decision not to renew her contract; however the Tribunal went beyond the surface.

[24] It is clear that notwithstanding the fact that the Claimant did not have a degree, she was able to perform the role required of her for two years. Indeed, having realised that the Claimant did not have a degree on or about April 8, 2013, the Respondent allowed the Claimant to continue working until the end of her contract. Certainly if there was concern about the Claimant's lack of qualifications the Respondent would have dismissed her immediately upon recognising that she did not possess a degree in April 2013. Instead it allowed her to come to work everyday and perform her duties for 5 months, that is, until the end of her fixed term contract. The Tribunal does not believe that this was the principal reason for the decision not to renew the Claimant's contract.

[25] Instead the Tribunal determined that the relationship between the Claimant and staff of the Respondent was of more significance. In his witness statement Mr. Thompson testified that:

Ms Payne was a very challenging employee to manage and supervise. Her attitude and approach to matters were often aggressive. She displayed arrogance when dealing with some members of staff.

[26] This conflict in personalities with staff at the Respondent was also illustrated in the Claimant's evidence. Paragraphs 3 to 4 outline an incident between the Claimant and the Assistant Director of the Respondent that highlights this conflict. Further, at paragraph 7 of her witness statement, the Claimant testified that:

*At the time that the said letter was delivered to me, two reasons for termination of my employment were given to me orally. The reasons given at that time were that the Respondent thought I had a degree, and that **I had displayed a bad attitude [Emphasis ours].***

[27] This clash of personalities was a theme throughout this case. The tribunal finds that it was the underlying issue of most if not all of the conflict between the Claimant and the Respondent. It is for this reason that the Tribunal finds that the principal reason for the decision not to renew the Claimant's contract was a conflict of personalities leading to a breakdown in the professional

relationship between the Claimant and (on the available evidence), the Director and Assistant Director of the Respondent.

- [28] The Tribunal is constrained to state here that though a personality clash leading to disruption in the workplace can be considered “some other substantial reason of a kind such as to justify the dismissal” and therefore a potentially fair reason for dismissal; based on the Respondent’s concession, the Tribunal was not required to consider whether that it was a fair reason in this case.

What is the appropriate remedy?

- [29] Having determined that the Claimant was unfairly dismissed the Tribunal complied with its obligation under Section 33 of the **Act** and explained the orders that it was permitted to make.
- [30] The Claimant has indicated that she would like to be reinstated to the post of Public Relations/Marketing Officer at the Respondent, failing that she asked to be re-engaged in the post of Communications Officer and in the final alternative a financial award.
- [31] Having found that the Claimant and two senior officers of the Respondent had a conflict of personalities leading to a breakdown in the professional relationship, the Tribunal considered it inappropriate to return the Claimant to that professional environment. In the circumstances, the Tribunal does not consider it practicable or indeed just to reinstate or re-engage the Claimant. Consequently, the Tribunal finds that a financial award would be appropriate.
- [32] The Claimant made oral submissions in respect of the compensatory award on August 8, 2017. Elements of the Claimant’s submissions (e.g. the loss of future gratuity and a car loan benefit) provided challenges to the Tribunal and therefore further information was sought. At the conclusion of this hearing the Tribunal asked the Claimant and the Respondent to work together to produce an affidavit to assist the Tribunal in calculating a basic award but more importantly the compensatory award.
- [33] An undertaking was given that this affidavit would be produced on or before August 20, 2017. As a failsafe, the Tribunal also indicated that if the affidavit could not be made jointly to let us know and we would set further directions to obtain the required information. The Tribunal advised the parties that the matter was adjourned until the affidavit was produced.
- [34] Instead of producing the requested affidavit, Counsel for the Claimant wrote to the then Chairman of the Tribunal Mr. Hal Gollop on October 30, 2017 enquiring about the outstanding decision. By email dated October 31, 2017 this Tribunal, through the Secretary of the Tribunal responded to Counsel for the Claimant reminding her that information required for the completion of the decision remained outstanding. To date the affidavit requested by this Tribunal has not been provided. Following the issuance of several letters by Counsel for the Claimant seeking a

decision and in the absence of the requested affidavit, the Tribunal will now determine the Claimant's financial award.

Basic Award

[35] The Claimant is entitled to receive a basic award pursuant to Section 1 (a) of the Fifth Schedule of the **Act**.

[36] The Respondent employed the Claimant for a period of 2 years and the evidence shows that her monthly salary was the sum of **\$4,734.26**. Pursuant to the formula set out at Section 2 (2) of the Fifth Schedule of the **Act**, the Claimant is entitled to a basic award in the sum of **\$5,462.60**. This sum being her weekly wage of **\$1,092.52** ($4,734.26 \times 12 \div 52$) multiplied by 2.5 multiplied by 2 being the number of years she was employed.

Compensatory Award

[37] Having addressed the basic award, the Tribunal must now consider whether it is appropriate to make a compensatory award pursuant to Section 1 (b) of the Fifth Schedule of the **Act**. This award represents a sum that the Tribunal believes reasonably reflects any benefit which the employee might have had but for the dismissal. Save for these parameters, quantifying this award is discretionary.

[38] The Claimant has submitted that the benefits she lost as a result of the dismissal include:

- i. Wages from the date of dismissal up until the date of the decision in the sum of \$277,919.40
- ii. Future wages in the sum of \$319,371.60
- iii. Future gratuity for a period of five years in the sum of \$63,874.32
- iv. Loss of the car loan benefit
- v. \$100,000.00 for the loss of reputation;
- vi. Loss of entitlement to statutory employment protection in the sum of \$1,000.00;
- vii. Loss of notice entitlement in the sum of \$2,367.63;
- viii. Loss of entitlement to protection against severance in the sum of \$2,000.00; and
- ix. The costs incurred by the Claimant in the matter.

Immediate Loss Wages

[39] Pursuant to the Claimant's contract dated November 2, 2012, her contract was terminable by one month's notice on either side or pay in lieu thereof. This period of notice is compliant with Section 22 (3) of the **Act**. A letter dated September 26, 2013 gave the Claimant notice that her contract

would not be renewed when it expired on October 31, 2013. This complied with the required notice provisions. In the circumstances, the Tribunal finds that there was no immediate loss of wages. It is in this context that the Tribunal makes no award for immediate loss of wages.

Loss of Future Wages

[40] The Tribunal accepts that an employee who has been unfairly dismissed is entitled to compensation for loss of future wages. The Tribunal further accepts the submission that how long an employee is likely to suffer loss flowing from dismissal is a matter to be estimated by the tribunal on the basis of its members' collective knowledge of industrial relations in the area.

[41] The Claimant has submitted she is entitled to \$319,371.60 in future wages. This would be 5 years wages, which was submitted as a reasonable period to allow the Claimant to "re-tool and find employment thereafter".

[42] Given the fact that it is the Claimant's case that she was qualified to perform the role of Public Relations/Marketing Officer and/or Communications Officer, the Tribunal is unclear of the nature of the "re-tooling" that the Claimant is required to do to find a job. In the absence of evidence on this point the Tribunal is unable to properly consider this as an element of loss of future wages.

[43] The Claimant in her witness statement indicated that despite several applications for jobs, she has not been successful in attaining employment. The Claimant has not advised the Tribunal of the nature of the jobs, or the qualifications required for the same. Therefore the Tribunal is unable to determine the reasonableness of the applications made by the Claimant. The Claimant has also stated in her evidence that she was trying to establish herself as a Communications Consultant, but due to the "economic climate" it proved to be difficult.

[44] The Tribunal also takes notice that the Claimant received unemployment benefits from the NIS from November 2013, to May 2014 (6 months).

[45] Based on her evidence, the Claimant's inability to find a job is a combination of the effect of her dismissal and the "economic climate". Therefore, given the information at the Tribunal's disposal, and its collective knowledge, the Tribunal estimates that the Claimant's future loss flowing from dismissal is 6 month's lost wages. This sum being **\$28,405.56**.

Loss of future gratuity

[46] The Claimant has not provided evidence to support her claim for a loss of future gratuity. In the circumstances the Tribunal makes no award under this head.

Loss of the car loan benefit

[47] The Claimant has not provided evidence to support her claim for a loss of a car loan benefit. In the circumstances the Tribunal makes no award under this head.

Loss of reputation

[48] The Claimant has not provided evidence to support her claim for a loss of reputation. In any event, the Tribunal doubts that it has the jurisdiction to make an award for loss of reputation. In the circumstances the Tribunal makes no award under this head.

Loss of entitlement to statutory employment protection

[49] The Claimant has not satisfied the Tribunal that she is entitled to the sum claimed for a loss of entitlement to statutory employment protection. In the circumstances the Tribunal makes no award under this head.

Loss of notice entitlement

[50] The Claimant has not satisfied the Tribunal that she is entitled to the sum claimed for a loss of notice entitlement. In the circumstances the Tribunal makes no award under this head.

Loss of entitlement to protection against severance

[51] The Claimant has not satisfied the Tribunal that she is entitled to the sum claimed for a loss of entitlement to protection against severance. In the circumstances the Tribunal makes no award under this head.

The costs incurred by the Claimant

[52] The Claimant has not provided evidence to support her claim for costs. Here again, the Tribunal doubts that it has the jurisdiction to make a costs award. In the circumstances the Tribunal makes no award under this head.

Conclusion

[53] In conclusion, the Tribunal finds that the Claimant was unfairly dismissed and as a result of said unfair dismissal she is entitled to the sum of **\$33,868.16** comprising of a basic award in the sum of **\$5,462.60** and a compensatory award in the sum of **\$28,405.56** as financial compensation.