

BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

NO. ERT/2014/002

BETWEEN:

ANNE-MARIE HOLDER

CLAIMANT

AND

AVG INVESTMENTS INC.

RESPONDENT

TRIBUNAL: Miss Kathy-A. Hamblin, Mr. Ulric Sealy and Mr. John Williams

Ms. Anne-Marie Holder, Claimant in person

Ms. Zarina Khan for the Respondent

DATES OF HEARING: June 17, 2015, September 10, 2015 and September 17, 2015

DECISION: September 25, 2015

SUMMARY OF THE FACTS

The Claimant, Anne-Marie Holder of Four Hill, St. Peter, complained that on May 28, 2013, she was unfairly dismissed by the Respondent, AVG Investments Inc., a limited liability company whose registered office is at Mount Hill, St. George. The Claimant stated that she was employed as a gas attendant at a gross weekly wage of \$250.00 from March 16, 2011, until her dismissal. Her net wages amounted to \$224.75 per week. She did not receive any other benefits. The Claimant was stationed at Sol Service Station, Mile-and-A-Quarter, St. Peter. Her duties included dispensing gas, diesel, bottled gas and ice and *"helping out in any way possible [with] customer service"*.

The Claimant alleged that on May 28, 2013, she went into the service station near the end of her shift to *"pay monies on a pump"*. She was approached by the husband of Ms. Anne Simpson, a director of the Respondent Company, and summoned to the office. In the presence of the management team, the Claimant was informed by Mr. Gregg Simpson, another director, that the Respondent had investigated a missing bottle of gas and had concluded that the Claimant was involved in the theft of that bottle of gas. The Claimant further stated that she was informed by Mr. Simpson that he would terminate her services. She alleged that Mr. Simpson asked whether she had anything to say, to which she responded in the negative. She was then handed a termination letter. The Claimant denied any involvement in the theft of bottled gas.

SUMMARY OF THE PLEADINGS

This matter was commenced by complaint made to the Chief Labour Officer by the Claimant on May 29, 2013 and July 8, 2013. The Chief Labour Officer certified by letter dated July 22, 2013 that

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efforts at achieving an amicable resolution of the matter were unsuccessful, and the matter was consequently referred to this Tribunal pursuant to section 43 (2) of the Employment Rights Act, 2012 (“the Act”) for hearing and determination.

The Claimant filed a witness statement dated July 2, 2014 and another statement dated July 18, 2014, both setting out substantially the same facts. The Respondent filed a single witness statement, that of Ms. Anne Simpson on November 28, 2014, together with a document titled “Bottle Gas Reconciliation-April, 2013 (Ms. Holder’s Shifts)”, a copy of the termination letter dated May 28, 2013, the National Insurance Office’s Termination of Services/Lay-off Certificate and the employment offer letter dated March 16, 2011, from the Respondent to the Claimant.

ISSUE

The issue for determination by the Tribunal was whether the Claimant was unfairly dismissed by the Respondent.

The claim fails if the Respondent shows:

- i) The reason for dismissing the Claimant;
- ii) That the reason falls within Section 29 (2) of the Act, or alternatively, is some other substantial reason sufficient to justify dismissal;
- iii) That the Respondent acted reasonably in treating the reason given for dismissing the Claimant as a sufficient reason for terminating her services; and
- iv) That the Respondent complied with the procedural requirements set out at Part A of the Fourth Schedule.

If the Respondent acted unreasonably in treating the reason given for dismissing the Claimant as sufficient reason for dismissal, or failed to comply with the procedural requirements set out in the Fourth Schedule, then the claim succeeds and the Claimant is entitled to one of three remedies: reinstatement if that remedy is appropriate in the circumstances and, if reinstatement is not appropriate, then the Tribunal may consider an order for re-engagement. If neither reinstatement nor re-engagement is practical, the Tribunal shall award compensation for unfair dismissal.

BURDEN OF PROOF

There was no dispute that the employment contract was terminated by the Respondent and it was therefore for the Respondent to show, pursuant to Section 29 of the Act, the reason for the dismissal and that that reason was potentially fair.

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IN LIMINE SUBMISSION

The matter commenced on June 17, 2015, on which date counsel for the Respondent sought an adjournment on the ground that she had only recently been retained by the Respondent. She also informed the Tribunal that her recent information was that the arrest of the Claimant for theft of bottled gas was imminent.

On September 10, 2015, counsel for the Respondent submitted *in limine* that the complaint was brought well outside the three-month limitation period set out at Section 32 (2) (a) of the Act. She contended that the effective date of dismissal was May 28, 2013 and the complaint was not filed until 2014. She therefore submitted that the matter was not properly before the Tribunal.

The Tribunal ruled that the matter would proceed, relying in support of its decision on Section 8 (3) of the Act, which stipulates that “[a] complaint shall be taken to have been made to the Tribunal on the date that it is presented to the Chief Labour Officer pursuant to section 42.” The Claimant first complained to the Chief Labour Officer on May 29, 2013, one day after her dismissal, and again on July 8, 2013. Although the reason for dual complaints to the Chief Labour Officer is unclear, each complaint was filed well within the statutory three-month limitation period.

THE RESPONDENT’S CASE

Ms. Anne Simpson, the sole witness for the Respondent, testified that on April 25, 2013, she discovered certain irregularities regarding the previous day’s sales of bottled gas. She observed that extra duplicate receipts had been made and placed among the duplicate receipts for bottled gas sales. She pointed out that each receipt for bottled gas had a unique transaction number and that there were two duplicates for certain transactions, both copies bearing the same transaction number. Each receipt was for the sum of \$39.85.

Ms. Simpson explained that the procedure in place for the sale of bottled gas was that on payment the customer was issued with two receipts-an original and a duplicate. The customer retains the original receipt and the gas attendant retains the duplicate receipt once the customer takes delivery of the bottled gas. Ms. Simpson also stated that under no circumstances, if ordinary company procedure was followed, should multiple duplicate receipts have been provided for a single transaction. She stated further that duplicate receipts could not be accidentally generated and that one would have to intentionally go back into the system in order to print additional duplicate receipts.

Ms. Simpson stated that there were 2 shifts on duty on April 24, 2013, with the Claimant working the first shift. Ms. Simpson’s records showed that 6 bottles of gas went “missing” between the two shifts. She exhibited three duplicated receipts and stated that three receipts were “short” or

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missing. Ms. Simpson further testified that once she discovered duplicate receipts for April 24, 2013, she reviewed bottled gas sales for other dates to see if she “picked up a trend”. Her findings prompted her to call a meeting with each individual on whose shift the discrepancies occurred, including the Claimant.

Ms. Simpson also stated that she met with the Claimant on April 25, 2013, and at that meeting she showed the Claimant the records for April 24, 2013, as well as any available records for other shifts for that week. Ms. Simpson testified that when asked for an explanation, the Claimant offered none. According to Ms. Simpson, the Claimant denied knowledge of any bottled gas that had not been paid for. The Claimant did not question the accuracy of the shift report.

The witness further testified that between the April 25, 2013, meeting and the Claimant’s termination on May 28, 2013, she did additional reconciliation for the month of April, 2013, which showed a pattern of duplication and inconsistencies. She subsequently filed a report with District “E” police station, and the matter was referred to the Fraud Department.

Under cross-examination by the Claimant, the witness stated that she could not recall the Claimant telling her that it was possible for customers to mix up empty gas bottles with full bottles.

In response to questions posed to her by the Tribunal, Ms. Simpson stated that at least 2 gas attendants worked each shift and that more than one person transacted gas sales on each shift. She further stated that receipts for bottled gas sales were generated by the cashier at all times and that the Claimant did not operate the cash register.

Ms. Simpson informed the Tribunal that as part of her investigations, she undertook a manual count of empty and full gas bottles assisted by the supervisor and manager on duty. The Claimant was neither on duty nor present when that count was undertaken. According to the witness, the manual count revealed no irregularities. Ms. Simpson also noted that bottled gas sales were tallied at the beginning and ending of each shift and that the shift supervisor usually took an inventory of the bottled gas at the start and end of a shift. Where any shortages were detected, a count was undertaken and the shortage was reported to management.

The Tribunal referred Ms. Simpson to paragraphs 3 and 8, respectively, of her witness statement and specifically to her statements that “*prior to these dismissals I have not experienced such shortages at this location*” and that “*since the dismissal we have not experienced shortages with regards to our bottle gas sales.*” The Tribunal queried the reason for the dismissal of the Claimant if no bottled gas was missing either prior to or after the Claimant’s dismissal. Ms. Simpson responded that she probably did not express herself clearly.

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Ms. Simpson denied deducting the cost of any missing gas from the Claimant's wages, noting that it was the Respondent's policy to deduct "shorts" from an employee's wages. On further questioning by the Tribunal, she stated that she could neither confirm nor deny that the deduction of the sum of \$39.85 from the wages of the Claimant sometime during the period April 28, 2013, to May 12, 2013, represented reimbursement of the cost of a bottle of gas.

Of the April 25, 2013, meeting, Ms. Simpson stated she met separately with each employee who had worked on the Claimant's April 24, 2013, shift. In addition to the employee, present at the meeting were the manager and two other directors of the Respondent Company. Ms. Simpson admitted that she did not provide any written statement to the Claimant concerning the theft of bottled gas. It was not until that April 25, 2013 meeting that the Claimant learned that the Respondent wanted to discuss with her the theft of bottled gas. Ms. Simpson admitted that she did not advise the Claimant that she had the right to have a representative present at the meeting, nor did she inform the Claimant that the Respondent was contemplating taking disciplinary action against her. She also stated that she did not inform the Claimant of the allegations made against the Claimant by another employee. She stated further that up until September 10, 2015, she had not disclosed to the Claimant the identity of that employee or the nature of the allegations that had been made against the Claimant by that employee.

Ms. Simpson informed the Tribunal that her investigations were limited to reconciliation of sales sheets and questioning of employees, and that she had uncovered evidence of duplication of receipts. She also stated that none of the now former employees on the Claimant's shift has been charged in connection with the theft of the Respondent's bottled gas.

Ms. Simpson's account of the circumstances surrounding the termination of the Claimant on May 28, 2013, corroborates the Claimant's account as set out in the Claimant's witness statement. The Claimant stated that she was summoned without notice to a meeting and advised there and then that she was being terminated for theft. Ms. Simpson admitted that the Respondent notified the Claimant for the first time at the meeting on May 28, 2013, that she was being terminated for theft.

Ms. Simpson stated that although the termination letter dated May 28, 2013 was silent on the nature and value of the property allegedly stolen, describing it only as "company property", at the May 28, 2013 meeting, she did specify the property allegedly stolen, and the period over which it was stolen though not the exact dates, that she "*may have mentioned*" the total value of the stolen property, but she could not recall whether she had specified the quantity of bottled gas allegedly stolen.

Ms. Simpson confirmed that the Respondent did not advise the Claimant that she had a right to appeal against the dismissal, and that the Respondent did not, at that May 28, 2013, meeting, give a statement to the Claimant containing particulars of the alleged theft.

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Ms. Simpson stated that prior to the Claimant's dismissal she had cause only to issue verbal warnings to the Claimant for minor infractions such as "a drop in service". She had no cause to seriously discipline the Claimant at any time during the course of her more than two years of employment with the Respondent.

ADMISSION OF LIABILITY

On September 17, 2015, Ms. Khan informed the Tribunal that the Respondent would concede that the Respondent had failed to follow the disciplinary procedure set out in the Fourth Schedule of the Act and was willing to compensate the Claimant. The Tribunal explained to the Claimant the orders which it could make pursuant to Section 33 (2) of the Act. However, the Claimant indicated that she is now gainfully employed elsewhere and had no interest in either reinstatement or reengagement by the Respondent.

Consequently, the Tribunal declares, by consent, that on May 28, 2013, the Claimant, Anne Marie Holder was unfairly dismissed from her position as a gas attendant at Sol Service Station, Mile-& A-Quarter, St. Peter by the Respondent AVG Investments Inc., in that the Respondent failed to comply with the disciplinary procedures set out in the Fourth Schedule of the Act and the Respondent is therefore in breach of Section 29 (5) (b) of the Act.

The Tribunal also finds, based on the evidence of the Respondent's sole witness, that the Respondent did not act reasonably in treating the reason given by the Respondent for dismissing the Claimant as sufficient justification for dismissal.

In view of the foregoing the Tribunal makes the following order for compensation in accordance with the Fifth Schedule of the Act:

BASIC AWARD

Section 1 (a) provides for the payment by the Respondent to the Claimant of a basic award of 2.5 weeks wages for each year of employment. The Claimant was employed by the Respondent from March 16, 2011 until May 28, 2013, that is, two clear years of employment and she is therefore entitled to a basic award in the net sum of **One thousand one hundred and twenty-three dollars and seventy five cents (\$1,123.75).**

LOSS OF WAGES

The Claimant is entitled to be restored to the position in which she would have been but for the unfair termination of her services on May 28, 2013. A total of 120 weeks have elapsed between the date of dismissal and the date of this decision. The Claimant confirms that she has been employed at a gross weekly wage of \$250.00 since on or about January 15, 2015, that is, approximately 33

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weeks. Prior to that date, she was employed for two weeks at a gross weekly wage of \$300.00. Taking into account the sums earned by the Claimant from those two employers over the course of a 35 week period, the Tribunal awards the Claimant compensation at the weekly rate of \$224.75 for a total of 85 weeks from May 29, 2013 until January 14, 2015, or the sum of **Nineteen thousand one hundred and three dollars and seventy-five cents (\$19,103.75)** pursuant to section 1(b) of the Fifth Schedule.

HOLIDAY PAY

The Claimant is also entitled, in accordance with Section 1(b) of the Fifth Schedule, to compensation for “*any benefit which she might reasonably be expected to have had but for the dismissal.*” Holiday pay is one such benefit.

In accordance with Section 3 (2) of the Holidays with Pay Act, Chapter 348 of the Laws of Barbados, she was entitled to holiday with pay on the anniversary of commencement of her employment with the Respondent, that is, March 16. Both parties agree that the Claimant’s vacation pay for the year ending March 16, 2013 was fully paid up at the date of dismissal.

Accordingly, the Tribunal awards the following sums in respect of holiday pay for the period March 17, 2013 to January 14, 2015:

- i) For the period March 17, 2013 to March 16, 2014, the Claimant is entitled to three weeks’ pay at the rate of **Two hundred and twenty-four dollars and seventy-five cents (\$224.75)** per week or the sum of **Six hundred and seventy-four dollars and twenty-five cents (\$674.25)**.
- ii) The Claimant secured alternative employment in January, 2015, approximately 2 months short of the fourth anniversary of commencement of her employment with the Respondent. Section 2 of the Holidays with Pay Act defines a “*year of employment*”, in relation to an employee, as “*any period of 12 months during which the employee has actually performed labour or rendered services for the same employer for an aggregate of at least 208 days, in the case of employees employed on a weekly, fortnightly, monthly or yearly basis, and at least 150 days, in the case of any other employees.*” If the Claimant, had remained in the employ of the Respondent until January 14, 2015 she would have completed approximately 220 days’ service within the meaning of Section 2 of that Act. However, the Claimant fell short of a “year of employment” as defined in the Holidays with Pay Act and does not therefore qualify for her full annual holiday for the period March 17, 2014 to January 14, 2015.

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The Tribunal finds that the Claimant is entitled to a prorated sum for the period March 17, 2014 to January 14, 2015, calculated in accordance with Section 6(1) of the Holidays with Pay Act which provides as follows:

“Where any employee has been employed by an employer for a period of not less than three months’ continuous employment and such employment is terminated, the employer shall forthwith pay to the employee in addition to all other amounts due to him, his average pay for the period of his employment with such employer.”

For that 44-week period, the Claimant is entitled to the sum of **Five hundred and seventy dollars and fifty-two cents (\$570.52)** being 3/52 parts of her net weekly wage of \$224.75.

Consequently, the Respondent is ordered to pay the Claimant holiday pay in the total sum of **One thousand two hundred and forty-four dollars and seventy-seven cents (\$1,244.77)**.

NOTICE

In addition to the above sums, Section 22 (1) (b) of the Act specifies that the minimum notice to be given to an employee who has been employed for a continuous period of two years or more but less than five years is two weeks. The Claimant alleged, and the Respondent’s witness admitted, that the Claimant received inadequate notice of termination. The Respondent shall therefore pay the Claimant the sum of **Four hundred and forty-nine dollars and fifty cents (\$449.50)** which represents two weeks’ wages in respect of outstanding notice, in addition to the further sum of two weeks’ wages in accordance with Section 24 (2) (a), for a total of **Eight hundred and ninety-nine dollars (\$899.00)**. If the Respondent fails to comply with this order the Respondent shall also pay the Claimant a sum equivalent to 4 weeks wages for each month or part thereof during which the Respondent fails to comply with this order.

REIMBURSEMENT OF MONEYS DEDUCTED FROM THE CLAIMANT’S WAGES

The Claimant asserted that an aggregate sum of **One hundred and eighty-three dollars and thirty-two cents (\$183.32)** was deducted from her weekly wages between April 28, 2013 and May 12, 2013. Ms. Simpson contended that those deductions were for “shorts”. The Tribunal is persuaded that of that sum, **Thirty-nine dollars and eighty-five cents (\$39.85)** representing the cost of a 20lb bottle of gas was unreasonably deducted from the Claimant’s wages, the Respondent having failed to establish that the Claimant engaged in the misconduct alleged. Consequently, the Claimant is entitled to reimbursement of that sum.

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MITIGATION OF EMPLOYER'S LIABILITY

The Tribunal is mandated by Section 36 of the Act to take into account such other benefits as it thinks appropriate in the circumstances, as well as any other mitigating circumstances so as to reduce the liability of the employer. The Tribunal considered the fact that the Claimant received unemployment benefits in the sum of \$3,951.48 for the period May 29, 2013 to November 26, 2013, but will not set off that sum against the sums to be paid to her by the Respondent since the awards are calculated on the Claimant's net wages.

Counsel for the Respondent asked the Tribunal to consider, in mitigation of damages, the Respondent's admission on the second day of the hearing that it failed to comply with the procedural requirements set out in the Act and is therefore liable to compensate the Claimant. While the Tribunal does not rule out in future treating as a mitigating factor an early admission of liability, it will not do so in the instant case.

At the start of and during the course of these proceedings, reference was made by the Respondent to the continued involvement of the Royal Barbados Police Force in the matter and to the imminent arrest of the Claimant for theft of bottled gas. While the Tribunal hesitates to ascribe to the Respondent any malicious intent, we view comments such as these as intimidatory in nature, and if left unchecked could undermine the rights conferred by the Act.

CONCLUSION

The total award to the Claimant is the sum of **Twenty-two thousand four hundred and eleven dollars and twelve cents (\$22,411.12)** to be paid by the Respondent to the Claimant on or before October 31, 2015.

KATHY-A. HAMBLIN
Deputy Chairman

ULRIC SEALY
Member

JOHN WILLIAMS
Member