

ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT

Reference No. 23 of 1999

BETWEEN:

ELDRIDGE BROWNE

Employee

and

ANTIGUA AND BARBUDA PORT AUTHORITY

Employer

Before:

Mrs. Nelleen Rogers Murdoch - Chairman

Miss Genevieve Benjamin - Member

Appearances:

Baldwin Spencer (AWU) for the Employee

Raymond Dexter Wason, Solicitor, for the Employer

2001: August, 20th
September 3rd

JUDGEMENT

Unfair dismissal - claim for compensation - Employee arrested and charged with criminal offence in connection with his employment - suspended - conviction for criminal offence - dismissal without further investigation - whether failure to conduct further investigation amounts to unfair dismissal.

FACTS:

1. The Employee was employed by the Employer as a tally clerk from March, 1984 to December, 1995.
2. On or about 5th December, 1995 goods consigned to the Employee but unmanifested were removed from the Port without payment of the applicable duties. The Employee was on the said 5th December, 1995 arrested and subsequently charged with fraudulent evasion of customs duties and knowingly receiving goods on which duty was not paid. The Employee was suspended indefinitely without pay pending the outcome of the criminal charge on 11th December, 1995 and on 12th December, 1995 pleaded guilty and was convicted on the said two charges. The Employee was thereafter dismissed by the Employer by letter dated 22nd December, 1995.

CLAIM:

3. The Employee claims that he was unfairly dismissed as the Employer conducted no internal investigation into the matter and held no discussion with him prior to the dismissal, contrary to section C59 of the Labour Code.

EMPLOYEE'S EVIDENCE

4. The Employee gave evidence that he was employed with the Port as a tally clerk from 1984 to 1995. His duties included operating in the transit shed and its surroundings and entailed checking cargo and making deliveries of goods to consignees.
5. He stated that on 5th December, 1995 unmanifested goods contained in several boxes were consigned to him. He was on duty that day. He stated that as a consignee of unmanifested goods and a port employee the procedure that was used was to go to Customs who would send an officer to inspect the goods. A paper would then be issued by Customs stamped to say the goods were cleared on

examination. The witness submitted a form which was identified and marked "EB1" which consisted of a Customs stamp containing the following words and information "Cleared upon examination, customs officer signature. ID No. Date and time."

6. The Employee stated that this procedure was followed in respect of the goods that were consigned to him and that the said paper "EB1" was signed by one Mr. Constant who was a customs guard, and the goods were sent to the gate and released on the basis of "EB1" and collected by a pickup on his behalf. The goods were taken to the Employee's home.
7. He further stated that he was visited by the police at his home the same night. The goods were seized by the police, and he was arrested and subsequently charged with fraudulent evasion of customs duties. The matter was listed for hearing at court on December 12th 1995. The Employee was represented by counsel, advised to plead guilty, did so and was convicted and fined.
8. The Employee states that after the court hearing, he went to the Port to make enquiries about his job but was told to go home and he would hear from the Employer. He subsequently received a letter which was read to him by the shop steward dated 22nd December, 1995 indicating that he had been dismissed. He states that his dismissal was unfair and that no discussion was held with him by the Employer after he was suspended. The Employee also denies that he did anything wrong and stated that the procedure he employed to obtain the unmanifested goods is a well established procedure that applied to all Employees of the Port and that this procedure was well known to the Employer.

EMPLOYER'S EVIDENCE

9. The Employer's evidence is that there had been numerous complaints about pilferage, theft and irregularities at the Port as a result of which the management considered the matter seriously and set up a system to curb the theft and disappearance of goods. The Employee's case was one of the first cases that was dealt with when the new security measures were put in place.

10. The procedure to be followed for unmanifested goods was similar to that for manifested goods. Once the unmanifested goods were included by addition onto the ship's manifest duties were payable on all goods whether manifested or unmanifested.
11. The Employer stated that the procedure for having goods released from the Port was not followed by Mr. Brown. The procedure was outlined by a witness for the Employer who is a customs officer and who admitted that he began working at the Port after the Employee had been terminated. He could not say if the procedure he outlined had been changed or if a different procedure existed when the Employee was employed.
12. He stated that unmanifested goods that arrived were listed on an amendment form by addition and were thus included on the ship's manifest. He stated that to the best of his knowledge duty is payable on unmanifested goods. He described the procedure which included tallying of the goods, and filling out the amendment form to make the goods part of the ship's manifest. After the goods are included on the amendment form, a release is obtained from the ship's agent and a copy of the amendment issued to the Port, the agent and Customs Department. After the consignee obtained a release from the agent the Port and Customs then would proceed to clear the goods.
13. The witness stated that clearing of the goods involved the goods being taken to the transit shed, Customs examining the goods, describing the same and assessing the value and indicating what duty was payable. This information would be entered on the warrant or the customs entry form. The consignee would then pay duty on the goods as indicated on the warrant. When duty was paid the warrant would be stamped in triplicate by the Customs Department and a copy given to the consignee. The copy would indicate that duty had been paid. The warrant would then be taken to the tariff clerk who would double check the warrant for accounting purposes, then the customs officer would collect the duty and process the warrant through an imprest machine which would stamp the warrant appropriately indicating how much duty was paid, which vessel the goods came on and other relevant information.

The stamped warrant would be returned to the importer who would take it along with the release to the warehouse. The goods would then be marked off the manifest and the manifest office would stamp a customs clearance release on the release. The customs clearance release referred to is a stamp which would indicate to the Port that duty was paid so that the Port would issue a gate pass.

14. The witness stated that the gate pass to which he referred was not "EB1" which the Employee had used to have his goods released from the Port. He explained that "EB1" was a stamp only used by a senior customs officer in conjunction with a gate pass. This was used when large consignments of goods arrived upon which duty was payable and paid, and small quantities of the large consignment were released to the importer. This stamp would be used to permit for example a portion of the large consignment to leave the port after duty was paid or assessed on the large consignment. He also gave evidence that "EB1" would sometimes be used by customs officers to permit dunnage or goods of minimal value to go out the gate, or such goods upon which the customs officer in his discretion deems that no duties were payable. He stated that the Employee's shipment would never have been classified as dunnage.

ISSUES:

- (i) Whether the Employer was under a duty to carry out an internal investigation into the matter prior to dismissing the Employee.
- (ii) Whether the Employer's failure to carry out an internal investigation of the matter after the Employee's conviction amounts to an unfair dismissal.

EMPLOYEE'S SUBMISSION

15. Mr. Spencer for the Employee submitted that pursuant to the Antigua Labour Code an Employee has a right not to be unfairly dismissed. He submitted that pursuant

to the law the onus is on the Employer to establish beyond doubt that his action in dismissing an Employee is fair taking all the circumstances into consideration.

16. Mr. Spencer further submitted that while it is true that a dismissal can be fair even when criminal guilt is not established, the converse is also true in that even where there might be a criminal conviction, that in itself does not make the dismissal fair particularly when the Employer is totally relying on the criminal conviction to substantiate the dismissal.
17. Mr. Spencer further submitted that while an Employee can be dismissed under the Labour Code for the commission of a criminal offence, section C59 of the Labour Code specified that the offence must be committed "without the consent express or implied of the Employer and that the Employee in his evidence stated that from time to time the Employer was aware that unmanifested goods belonging to Employees of the Port did leave and was allowed to leave the Port without the payment of the relevant duties.
18. Mr. Spencer also submitted that there was a failure of due process on the Employer's part as the Port was his Employer, not the Customs Department, so that Customs' investigation into a criminal charge was not sufficient. He submitted that the Employer was under a legal duty, prior to terminating the employment to carry out an internal investigation into the matter to satisfy itself that the only course open to it as Employer was termination.
19. Mr. Spencer also submitted that the Employer had failed in the dismissal letter to state the precise and specific reason for the dismissal so that there would be no doubt in the Employee's mind as to the reasons for his dismissal. He submitted that the Employer's failure to precisely state the reasons in the letter of dismissal was a fundamental flaw in dealing with the issue of unfair dismissal.

EMPLOYER'S SUBMISSIONS

20. Mr. Wason for the Employer submitted that the Employer's case was based on two points (a) the relevant section of the law, section C59(1) (b), of the Labour Code and (b) the second point he submitted was that the Employer's memo to the

Employee i.e the dismissal letter of December 22nd dealt with two issues, the first paragraph dealt with the issue of trust, as the Employee was in a position of trust and the evidence showed that the employee was in breach of his implied duty of fidelity.

21. Mr. Wason submitted that with respect to section C59(1)(b) the employee had clearly admitted to committing a criminal offence and that he was at work on the day the event happened so that there is no doubt that the offence happened in the course of his employment. He had used his position, knowledge and relationship as an Employee of the Port in acting as he did. He was therefore undoubtedly acting in the course of his employment.
22. He also submitted that the offence was also so serious that the employer could not be expected to take any other course but termination. He stated that the matter was a serious matter involving loss of revenue to the State and that the fact that the penalties which were imposed by law were so severe indicated that the matter was a serious matter notwithstanding that the duty on the goods themselves was not very high.
23. Mr. Wason also submitted that although it was clear that the Employer had conducted no investigation into the matter prior to the termination and that although it was good industrial practice to conduct such an investigation, that the facts of the case were so clear that there is no doubt that the Employee's admitted misconduct in the course of his employment was sufficient to justify the dismissal.
24. Mr. Wason referred the court to several cases including No. 20 of 1993 Maria Esbrand vs. Island Wave Ltd. in which an Employee had admitted wrong doing; No. 22 of 1993 Neil Gomes vs Liat (1974) Ltd. in which a dismissal was held not to be unlawful where an Employee was arrested and charged on suspicion of trafficking in illegal drugs, and the charges were subsequently dropped; and No. 56 and 57 of 1999 Samuel Leonard et al vs Sandals (Antigua) Ltd.

LAW

25. The law is to be found in the Antigua Labour Code. Section C58 of the code provides the test for a good cause for dismissal as follows:

“C.58(1) A dismissal shall not be unfair if the reason assigned by the Employer therefor -

- (a) relates to misconduct of the employee on the job within the limitations of sections C59(1) and (2).”

26. Section C59 of the code provides as follows:

“C.59(1) An employer may terminate the employment of an employee where the Employee has been guilty of misconduct in or in relation to his employment so serious that the Employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the Employee has

- (b) committed a criminal offence in the course of employment, without the consent express or implied of the Employer;

DISCUSSION:

- 27. This case is really quite simple. The Employee has admitted in his evidence that he received goods that were imported to Antigua and consigned to him without paying the relevant customs duties. Pursuant to section 116(2) of the Customs Control and Management Act, 1993 No. 7 of 1993, this is an offence. The Employee pleaded guilty to the offence after receiving independent legal advice, and was convicted.
- 28. While it is correct that an Employer in effecting a dismissal must be prudent to perform an investigation and to hear both sides of the matter, it is untrue to say that a failure to do so would necessarily render the dismissal unfair.
- 29. In the instant case it is admitted that there was no independent investigation of the matter but it is also clear that a criminal investigation had been carried out by the Port and the Police the body established by the State for so doing, and that the Employee as a result of the investigation pleaded guilty to the two criminal charges brought against him.
- 30. The law itself, the Labour Code, permits an Employer to fairly dismiss where an Employee has committed a criminal offence in the course of his employment. In the instant case the State's investigation led to a guilty plea by the Employee and

the Employee's subsequent conviction for the offence. In such circumstances, this court is of the view that the Employer would be very justified to forgo the normal requirement of an investigation and to rely on the State's investigation and subsequent conviction of the Employee.

31. The court views this as the logical and common sense approach to the issue, for to decide otherwise would be to render Employers and a fortiori, this court, as reviewers of the effective criminal tribunal set up by law and that is patently absurd.
32. It was also asserted on the Employee's behalf that the Employer had failed to state the precise reasons for the dismissal and this lack was a factor to be considered. Section C10(1) does require an Employer upon termination of an Employee to furnish the Employee within seven days of the termination with a written statement of the precise reasons for the termination.
33. The Employee was convicted on the 12th December, 1995. On the 22nd December, 1995 the Employer wrote to the Employee a letter in two paragraphs, the first indicating that the Employee had been terminated and the second which states as follows

“You have been convicted of a criminal offence in the course of your employment which shows clearly that your relationship with the Employer cannot reasonably be expected to continue.”
34. This statement in the court's view, is a sufficient statement of the reason for the dismissal. It cannot reasonably be argued that the first line of the paragraph would leave the Employee in any doubt as to the exact reason why he was being dismissed, particularly as it was exactly a mere two days before been convicted in a criminal court of an offence committed in the course of his employment.

CONCLUSION

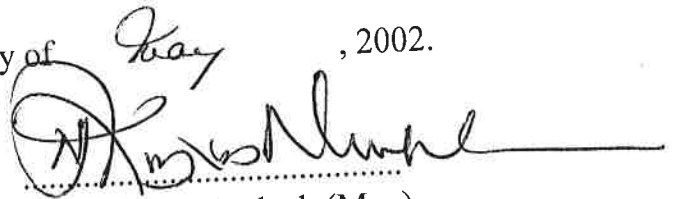
35. Having regard to all the evidence the Court therefore concludes:
 - (1) That the failure of the Employer to conduct an independent investigation in the face of a criminal conviction does not render the dismissal unfair;

- (2) That the Employer's letter of dismissal to the Employee although it did not spell out details of the offence or of the conviction was sufficiently clear in its reference to the conviction of a criminal offence to satisfy the requirements of Section C10(1) of the Code for a statement of the precise reason for dismissal.

DECISION

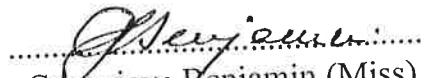
36. The Employer acted reasonably and was justified in dismissing the Employee.
The dismissal is not unfair and no compensation will be awarded to the Employee.

Dated the *10th* day of *May*, 2002.



N. Rogers Murdoch (Mrs.)
Chairman

I concur



Genevieve Benjamin (Miss)
Member