

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 11 of 2005

BETWEEN:

CARYLE ANTHONY

Employee

and

BBR SPORTIVE LTD

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. Samuel R. Aymer

Member

Appearances:

**Mr. Charlesworth O. D. Brown Attorney-at-Law for the
Employee**

Mr. John E. Fuller Attorney-at-Law for the Employer

2007: October 15

2008: November 26

JUDGMENT

PILGRIM P:

BACKGROUND

[1] Ms. Caryle Anthony is 35 years of age. She resides at Jennings Village. This is in the parish of St. Mary in Antigua. She was employed with BBR Sportive Limited from August 8, 1995 to June 12, 2004. BBR Sportive Limited owns a restaurant. She worked in it as an Accounts Manager. Apart from her main duties she also regularly performed other functions for the Employer. These included that of Receptionist, Payroll

Clerk, Hostess, Bartender and Waitress. Her last position, however, was that of Dining Room Supervisor. She worked for \$17.00 per hour. She also routinely worked on weekends and public holidays. Her average gross monthly pay was \$3,100.00.

- [2] The Employer was represented by Mr. Franz Bigler. He is a Director of the Company. He described her as being “*quite dedicated to her work. She did various things involving accounting, (being a) receptionist and she would help in the kitchen*” prior to her dismissal. He was “*happy with her performance.*”

The incident of June 12, 2004

- [3] An incident took place on the restaurant's premises on June 12, 2004. This incident involved the Employee and Peter Byers. He was a chef at the restaurant. He subsequently became deceased.
- [4] The Employee rendered a written statement to her Employer of an account of the incident. It was admitted into evidence. It is a part of her Witness Statement. This Witness Statement was filed on September 12, 2007.
- [5] Ms. Anthony's version of the incident is as follows. She states that on June 12, 2004 at about 9:35 pm she visited the kitchen. Her aim was to request of Mr. Byers to prepare a customer food order for pasta. He refused to prepare the order. He claimed that the kitchen was closed at 9:30 pm. The order was prepared by another cook. Her name is Rosalind Isaacs.

- [6] She obtained the pasta order from Ms. Isaacs. She left the kitchen. She took the order to the customer. She returned to the kitchen and placed the empty dish in the sink. Mr. Byers was washing dishes. He flicked water from his hand into her face. She did not touch him. Mr. Byers then shoved her in the neck and chest. He told her to leave the kitchen.
- [7] Before she left the kitchen she struck Mr. Byers in the back. He grabbed her in her throat. A struggle ensued between the two parties. Both of them were in a crouching position. She attempted to escape from his grasp. He clenched his fist and hit her in her left eye.
- [8] She complained of being in pain as a result of being struck by Mr. Byers. She punched him in his groin. He relaxed his grip of her. However he kept holding her. Ms. Isaacs left the kitchen.
- [9] Mr. Evanson Johnson entered the kitchen. He separated both parties. He stood between them. Mr. Byers attempted unsuccessfully to strike Ms. Anthony. She took up a plate. She threw it at Mr. Byers. It did not hit him. It broke.
- [10] Mr. Byers armed himself with a knife. He threw it at her in the direction of her head. It struck her on the right side of her head. She observed what appeared to be a lot of blood upon her as a result of being struck by Mr. Byers.
- [11] She was transported to the Holberton Hospital. The cut required four (4) stitches. Her left eye became swollen. She was unable to see from the

same eye. She obtained a leave of absence due to illness until June 28, 2004.

- [12] She remained hospitalised for two days as a consequence of the injuries which were inflicted upon her by Mr. Byers. Mr. Byers was arrested by the police. He was charged with wounding Ms. Anthony. The trial of this matter was pending before he died.
- [13] Mr. Bigler obtained written statements concerning the altercation between the two parties. He obtained a written statement from Ms. Anthony, Mr. Johnson and Ms. Isaacs. He obtained a verbal statement from one Mr. Prince. He received complaints from guests. Based upon the three written statements and the guests' complaints, Mr. Bigler dismissed the Employee by letter of June 16, 2004. This letter was admitted into evidence. It is part of the Employee's Witness Statement. The letter of dismissal reads as follows:

"16th June, 2004

*Miss Caryle Anthony,
Jennings Village,
Antigua, WI*

Dear Miss Anthony,

After further investigation of the incident which took place on Saturday, 12th of June, 2004 at BBR Sportive in which you were involved in a fight with a fellow worker, resulting in the destruction of company property, creating an embarrassing scene

during service hours and the worst, one staff ending up in the hospital and the other one being taken in to police custody, we regret to have to inform you that we have no alternative but to summarily dismiss you for serious misconduct.

Your cheque for accumulated holiday pay is included.

Yours sincerely,

Franz Bigler”

Mitigation Attempts

[14] After Ms. Anthony's termination she indicated that she sought to find other employment. She indicated that she sent a letter to Antigua and Barbuda Bank. She received a response which indicated that her application was placed in a file. She spoke to the manager of Castaway Bar and Restaurant with respect to obtaining any employment. In April 2005 she began working as a receptionist. She answers telephone calls. She receives a gross monthly sum of \$2,500.00.

LEGAL PROCEEDINGS

[15] Ms. Anthony commenced legal proceedings by filing a Reference on June 1, 2005. An Employee's Memorandum was filed on her behalf on January 22, 2007. Mr. John E. Fuller, Attorney-at-Law for the Employer requested that the Employer's name be changed to BBR Sportive Ltd. Mr. Brown had no objection. By consent of both parties the amendment was granted.

[16] The Employee filed her Witness Statement on September 21, 2007. A Witness Summary for Mr. Johnson was filed as well on September 21, 2007.

[17] No Employer's Memorandum was filed on the Employer's behalf. Mr. Franz Bigler appeared in person on the Employer's behalf.

THE ISSUES

[18] The issues which require a determination are as follows:

- (i) **Whether Ms. Anthony's conduct on June 12, 2004 amounted to misconduct which was so serious that BBR Sportive Limited could not reasonably have been expected to take any course other than to summarily dismiss her.**
- (ii) **Whether or not the Employer instituted a proper investigation of the incident which occurred on June 12, 2004.**
- (iii) **In the event that Ms. Anthony is held to be unfairly dismissed what is the measure of damages due to her.**

EMPLOYEE'S LEGAL SUBMISSIONS

[19] Mr. Brown made a number of submissions. These are more particularly contained in his document entitled "**Amended Employee's Closing Submissions.**" This was filed on November 6, 2007. Several case references were cited from a legal textbook. Unfortunately none of those cases were presented to the Court. Essentially Mr. Brown submits that (a) Ms. Anthony's dismissal was unfair and (b) that the Employer did not

carry out an adequate investigation of the incident which took place on June 12, 2004.

EMPLOYER'S LEGAL SUBMISSIONS

- [20] Mr. Fuller's Written Submissions were filed on November 20, 2007. This Court is grateful to Mr. Fuller for his presentation of three full and entire cases. They deal precisely with a determination of the central issues at paragraph [18]. With respect however, this Court does not derive much assistance from an analysis of those three cases.
- [21] The first case is **Maureen Michael v Leewind Paints (1980) Ltd. Ref. No. 2 of 1984**. A reading of this case reveals that the Employee who commenced proceedings to claim that she was unfairly dismissed was in fact the aggressor. She was summoned to a meeting by the Chairman and Chief Executive Officer of the Defendant. She took a cutlass to the meeting with the express purpose of scaring the Chief Executive Officer. The Court held that her conduct and verbal expressions to her employer warranted summary dismissal.
- [22] The second case is **Colbourne v Antigua Masonry Products Ltd. Ref. No. 14 of 1991**. In this case the unprovoked employee went to his car. He removed a hatchet for the purpose of arming himself. He was stopped by another employee who took the hatchet from him. Sometime later he was attacked by another employee. The Court held that the Employer was correct to summarily dismiss the Employee.

- [23] The third case is **Andrew v Antigua Commercial Bank Ltd. Ref. No. 30 of 1993**. In this case an employee of the bank upon being requested to render assistance to a customer of the bank, headed for the kitchen. He took up a knife and placed it on the table in the presence and sight of the other bank employee. He was the aggressor. The Court held that his act amounted to misconduct.
- [24] The Court observes that in those three cases all of the employees were armed with a cutlass, a hatchet and a knife respectively. They were held in two cases to be the perpetrators of the misconduct. In Colbourne's case however, although he was attacked by another employee, Mr. Colbourne had previously armed himself with a hatchet. It was this action which rendered his dismissal to be fair. The actions of those three employees with respect cannot reasonably be compared with that of Ms. Anthony. It is for these reasons that this Court finds these cases to be unhelpful.
- [25] Mr. Fuller submits that the Employer's investigation of the altercation between the two parties was adequate. He is of the view that "***There is no legal obligation on the employer to provide the employee with copies of the witnesses' statements.***" According to Mr. Fuller the issue of natural justice does not arise. No cases were cited by Mr. Fuller in support of these submissions.
- [26] Mr. Fuller submits that Ms. Anthony "***could have walked away***" from the fight. That she failed to do so rendered her actions to be misconduct. No cases were cited in support of this submission.

[27] In all of the circumstances of the case Mr. Fuller submits that the Employee's dismissal "*cannot be said to be unreasonable or that the dismissal was unfair.*"

THE LAW

[28] C 56 of the Labour Code states as follows:

"C 56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any employee without just cause."

C 58 (i) (a) and (2) of the Labour Code reads 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 section C 59 (1) and (2);

(b);

(c);

(d);

(e);

Provided, however, that there is a factual basis for the assigned reason.

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though the employer acted

reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

C 59 (1) (a) of the Labour Code reads as follows:

"C 59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct 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

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b);

(c);

[29] (i) The learned authors of **Smith & Wood's Employment Law, Ninth Edition, Oxford University Press, London, 2008** at page 509 thereof are of the following view:

"[M]isconduct in the modern statutory context fits into the overall pattern of unfair dismissal law in being essentially a matter of assessing the reasonableness of the employer's reaction to it in all the varied

circumstances of the case,.....it is a particularly wide category of dismissal, ranging from gross misconduct (still justifying summary dismissal) such as theft, violence, wilful refusal to obey an order and gross negligence.....”

- (ii) *“Faced with this wide diversity, there is sometimes an unfortunate tendency to attempt to over-classify, as if for example the many decided cases establish a “law on fighting at work;” while collecting together all the cases on one kind of misconduct may have some values, it must be stressed that that value is restricted to attempting to point out certain factors which may be important in certain of the more typical cases. Further than that, these matters remain clearly within the factual jurisdiction of the tribunals.”*
- “Conduct cases are very much based on their own facts.....”*

[30] *“Cases cannot be used as precedents.”* – See Principles of Employment Law, Fourth Edition, authored by Michael Jefferson, Cavendish Publishing Ltd; London, 2002 at paragraph 10.5.3.

[31] Some prior cases regard the dismissal of two employees in the workplace for fighting as fair. These involve situations in which the fights are serious. An illustration of this principle is **C. A. Parsons & Co. Ltd. v McLoughlin** [1978] I.R.L.R 65 (E.A.T). In this case Mr. McLoughlin

an employee of the appellant company was poked in the chest by another employee. He reacted in self-defence. The fight took place in a factory. Mr. Justice Kilner Brown at page 65 Number 2 described the respondent's reaction to being poked as follows:

“But the degree of ‘self defence’ was of such a nature that the foolish and unfortunate Mr. Dryland finished up in hospital.”

[32] Mr. Justice Kilner Brown also stated at page 65 Number 3 as follows:

“All instances of fighting in factories raise very grave problems for the employer..... [I]t ought not to be necessary for any body, let alone a shop steward, to have in black and white in the form of a rule that a fight is something which is going to be regarded very gravely by management.”

[33] Mr. Justice Kilner Brown was very careful to state at page 66 Number 9 that he took into consideration *“the circumstances of (that) case”* in arriving at the Court's decision. The Court upheld the Company's appeal. It held that Mr. McLoughlin was fairly dismissed. The effects in McLoughlin's case of an assault by the employee himself which was out of proportion to him being poked in the chest were obviously serious enough to warrant being summarily dismissed.

[34] On the other hand, the position may be different where the action is not so grave, having regard to certain circumstances. An illustration of this

principle is **Meyer Dunmore International Ltd. v Rogers [1978] I.R.L.R. 167 (E.A.T.)**. In this case Mr. Rogers was dismissed following a fight at the workplace with another employee. The Industrial Tribunal held his dismissal to be unfair. It deducted 10% of its assessment to take account of his contribution to the dismissal. The Company appealed against this decision.

- [35] The Employment Appeal Tribunal upheld the Industrial Tribunal's finding that the employee's dismissal was unfair. Although there was a rule which referred to "*any assault or violent act*" the Court held that this rule was not the same as having a clear, direct, specific rule brought directly to the attention of all employees that if they fight they will be dismissed. No evidence was led that due to the proximity of machinery, the fighting was particularly dangerous. With regard to the existence of a rule which governs fights at the work place Mr. Justice Phillips in delivering the judgment of the Court stated at page 168 No. 2 *inter alia* as follows:

"It is true that, of course, if in such a case an employee is dismissed, and if he complains to an Industrial Tribunal, IT IS THE INDUSTRIAL TRIBUNAL WHICH WILL HAVE THE LAST WORD."

(The emphasis in Capital letters is the Court's)

- [36] Whether or not a set of facts fall on one side or the other between the **Parson** and **Meyer** cases is a matter of fact and degree for the Court to decide.

Issue No. (i)

Whether Ms. Anthony's conduct on June 12, 2004 amounted to misconduct which was so serious that BBR Sportive Limited could not reasonably have been expected to take any course other than to summarily dismiss her.

[37] No evidence was led by the Employer to show that there was a rule in existence which stated that if a fight took place upon the Employer's place of business, both employees would be dismissed. Of course, there is no need for such a rule before the Employer may dismiss one or both Employees. If the circumstances of the case warranted summary dismissal then the dismissal shall be held to be fair. What are the further circumstances which are relevant to a determination of this issue?

[38] The Employee gave evidence. In answer to Mr. Fuller for the Employer, she stated *inter alia* as follows:

"I was dismissed without a hearing. I was requested by management to provide a written explanation of what took place. I did provide a statement and gave my side of what happened. I believe that Mr. Byers gave an explanation. I am not aware that Mr. Byers gave a statement. Mr. Byer flicked his hand at me with water on it. Some of the water went on me. I thought that he was possibly attempting to hit me. I flicked my hand back at him. Mr. Byers shoved me in my neck and chest. I hit Mr. Byers. Mr Byers held on to me. I did not punch him in his private parts. I punched him in the groin. Evie Johnson the bartender separated us.

Mr. Byers fired a cleaver at me. I fired a plate at him to defend myself. Mr. Byers is deceased. There was nothing to prevent me from walking away. Both Mr. Byers and myself were dismissed."

"When this incident happened Roslyn Isaacs was present. She was the other cook in the kitchen. I threw one plate."

- [39] In her response to Mr. Brown her Attorney-at-law in his re-examination of her, Ms. Anthony stated *inter alia* as follows:

"I told Mr. Byer not to flick water in my face. I flicked my hand at him. Between flicking my hand and punching him in the groin, he was in a crouching position. He punched me in my eye and in defending myself he got the groin punch. When he punched me he was holding me."

- [40] Mr. Evanson Johnson gave evidence for the Employee. He said that he is also known as Evie Johnson. He worked as a bartender for the Employer on June 12, 2004. He gave the following evidence in cross examination to Mr. Fuller:

"I did not see when Ms. Anthony punch Mr. Byer in his private parts. I heard both Ms. Anthony and Mr. Peter shouting at each other. I heard her say not to put his hand in her face. I saw Peter punch her. Ms. Caryle Anthony threw a plate at him. Peter did likewise. He

threw a plate at Caryle. When I went into the kitchen Ms Anthony and Mr. Byers were shouting at each other. Both were close and I held on to Ms. Anthony to pull her away. The same time Peter came over with the cleaver and hit her in the head while I was pulling her away from Peter. There were guests in the restaurant about 25 feet away.”

[41] His response to Mr. Fuller in cross examination mirrors his Witness Summary filed on September 21, 2007.

[42] Mr. Franz Bigler was the sole witness called in support of the Employer. He stated that he is the Managing Director of the Employer. He was aware of the incident which occurred in the restaurant on June 12, 2004.

[43] As a result of the fight between the two parties Mr. Bigler requested *“personnel on duty that night to give a written report”*. He obtained such reports from Ms. Anthony, Mr. Johnson and Ms. Rosalind Isaacs. He did not obtain one from Mr. Byers.

[44] His evidence in chief in response to Mr. Fuller continued as follows:

“As a result of the written reports I made a decision to dismiss the two employees. I DISMISSED MS. ANTHONY BECAUSE SHE HAD THE CHANCE TO WALK AWAY FROM THE INCIDENT, BUT SHE DID NOT WALK AWAY. I stand by the letter of

dismissal. (The emphasis in capital letters is the Court's)

- [45] In his response to Mr. Brown Mr. Bigler stated *inter alia* that he did not meet with Ms. Anthony before he dismissed her. He asked “*other employees*” certain questions with regard to the fight. One of them was Mr. Prince.
- [46] The report of Ms. Rosalind Isaacs was produced by Mr. Bigler. In her statement she stated that she was an employee of the Employer. On Saturday June 12, 2004 she was working as a cook in the kitchen. She gave Ms. Anthony some chicken wings which Mr. Byers had prepared for a guest. Ms. Anthony left the restaurant to take the chicken wings for the guest.
- [47] Ms. Isaacs’s statement reveals that Ms. Anthony returned to the kitchen with certain utensils. She went to the kitchen sink. Ms. Isaacs heard Ms. Anthony informing Mr. Byers to “*take his hand out of her face.*” Her statement continues as follows:
- “Next I heard a struggle. When I looked Peter and (Caryle were) wrestling, so I ran from the kitchen to call “Heavy” (presumably Mr. Johson) from the bar to stop the fight. When I returned to the kitchen with “Heavy” he tried to separate them by pulling Caryle away but she reached for 2 salad plates 6” and threw them at Peter. I then ran from the kitchen so I cannot say if the plates hit Peter or not. On my way back to the*

kitchen, “Heavy” was bringing Caryle out. She was crying and her face was covered with blood.”

- [48] Was the behaviour of Ms. Anthony so serious that the Employer could not reasonably be expected to take any course other than to dismiss her? Each case has to be decided upon its own particular facts. There may be though “*certain factors which may be important in certain of the more typical cases*” that may be relevant for a determination of the issue.
- See paragraph 29 (ii).

- [49] The factors which the Courts have taken into consideration so as to determine whether the employer has acted reasonably or unreasonably include the following matters:

- (i) The degree of ‘*self defence*’ and the type of business conducted by the employer.

- see **C.A. Parsons & Co. Ltd v McLoughlin (op cit) and Forgings & Presswork Ltd v McDougall [1974] I.C.R. 532**

- (ii) The seriousness of the fight between the two (2) parties is of some useful value.

- See **Meyer Dunmore International Ltd. v Rogers (op cit)**

- (iii) The length of service of the employees, any good conduct and whether the parties were subject to any prior serious disciplinary offences.

- See **Taylor v Parsons Peebles NEI Bruce Peebles Ltd[1981] I.R.L.R 119**

[50] An analysis of **Colbourne v Antigua Masonry Plant Ltd** (op cit) shows that in conjunction with the letter of dismissal, the Court also took into consideration **“the precise reasons for the dismissal”**. These **“came from the Managing Director in his testimony during cross-examination.”** It was his testimony that the employee **“went to his car and armed himself with a hatchet.”** The Court took this fact into consideration. It held that the employee’s dismissal was fair. It was **“immaterial that he gave over the hatchet when asked to do so by another employee.”**

- See pages 8, 9 and 13 of the judgment.

[51] The precise reason for the employee’s dismissal in this case was rendered by Mr. Bigler in answer to Mr. Fuller. The reason given by Mr. Bigler was that ***“she had the chance to walk away from the incident, but she did not walk away.”***

[52] The matter of Ms. Anthony’s not walking away from the incident is deserving of being analysed in light of all of the evidence. Ms. Anthony’s refusal to ***“turn and walk away”*** formed the fulcrum of Mr. Fuller’s submission to the Court. He submitted that ***“the incident was exacerbated by the employee escalating what was the fairly innocuous gesture of the chef flicking his hand at her by retaliating in kind a second time by hitting the chef in his back and by retaliating a third time throwing crockery at the chef. On each occasion, Ms. Anthony could have turned and walked away. She chose not to.”***

- See his Written Submissions at paragraph 8

[53] The evidence is that this incident was started by Mr. Byer. As he was washing dishes he flicked water from his hands in the face of Ms. Anthony. She thought that he was going to strike her. She flicked her hand back at him. The statement of Ms. Roslind Isaacs was introduced by Mr. Fuller in support of the Employer. It confirms Ms. Anthony's evidence in this respect. In Ms. Isaacs' statement she stated *inter alia* as follows:

"I then heard her telling Peter to take his hand out of her face."

[54] Of course Ms. Anthony had the opportunity to walk away. She did not. The reason why she did not walk away was because of Mr. Byer's response to her action of flicking "***her hand back at him.***" In similar manner Mr. Byers had the opportunity to walk away from the incident. At this stage she did not touch him.

[55] The next act was committed, not by Ms. Anthony, but by Mr. Byers. He proceeded to shove her in her neck and chest. He told her to get out of the kitchen. No doubt she felt offended by his actions. Instead of departing from the kitchen she hit Mr. Byers in his back. He did not walk away. Instead he grabbed her in the throat. Both parties struggled with one another. They ended up in a crouching position. In the struggle Mr. Johnson separated the parties. The fight was effectively over when Mr. Johnson separated them. Mr. Johnson stood between them. He is to be commended for his action.

[56] Mr. Byers was again dissatisfied with what transpired between himself and Ms. Anthony. He again acted in an aggressive manner. He fired his

fist at her. He missed her. She threw a plate at him. It missed him. He threw one at her. Whether it struck her or not is not known. The fight again at this stage ought to have been finished.

- [57] At this juncture, Ms. Anthony posed absolutely no threat to Mr. Byers. Mr. Johnson had arrived to keep the peace between the two parties. She did nothing to Mr. Byers at this stage. He wished to score a victory in a most devastating manner. The plate which she threw at him missed him.
- [58] What Mr. Byers then did to Ms. Anthony was uncalled for, callous and violent. He then took up a cleaver-like knife and according to Mr. Johnson *“hit her in her head while (he was pulling her away from Peter.)”*
- [59] The actions of Mr. Byers clearly reveal that he continued to act as the aggressor. In the first stage of the fight after she flicked her hand at him, he responded in a violent manner to attack Ms. Anthony. As the parties struggled with Mr. Byers holding on to Ms. Anthony, it was a natural defensive response for her to get away from him. This she did by punching him in his groin. She complained of being in extreme pain.
- [60] The second stage of the fight was characterised by Mr. Byers’ violent use of the cleaver-knife that resulted in his vicious attack upon Ms. Anthony. Mr. Johnson’s answer to Mr. Fuller in cross-examination does not support the contention that Ms. Anthony was not attempting to walk away. His answer was that as he was pulling her away from Mr. Byers, at the same time *“PETER CAME OVER with the cleaver and hit her in*

her head.....”. In other words as he was leading away Ms. Anthony from Mr. Byers, she was struck by him.

[61] The fact that Ms. Anthony did not walk away was insignificant in comparison to Mr. Byers’ actions. Whilst he flicked water in her face, she responded by a flick of her hand. When he shoved her in her neck and chest, she hit him in his back. When he held her in extreme pain and struck her in her eye, she naturally responded by punching him in his groin. Finally when she was being held by Mr. Johnson away from the scene, he pursued her and inflicted a violent act upon her.

Issue No. ii

Whether or not the Employer instituted a proper investigation of the incident which occurred on June 12, 2004.

[62] It is a basic principle of natural justice that an employee who is accused of committing an offence of misconduct is deserving of a fair hearing before that employee is dismissed. The principles of natural justice in the context of the requirement of an employer to institute a proper investigation were outlined by **Rawlins J. A. (ag)** (as he then was) in **The Epicurean Ltd v Medeline Taylor Civ. App. No. 4 of 2003**. At page 10 paragraph [33] **Rawlins J A** stated *inter alia* as follows:

“Natural justice

[33] The principles of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced

to ancient times, were known in medieval precedents and reached a “high water-mark” in their development in Dr. Bonham’s case (1610) 8 Co. Rep. 113b. Indeed, we were reminded that, although their disobedience was obvious, even Adam and Eve were given the opportunity to speak in their defence before they were cast out from the Garden of Eden.”

[63] The Employer must carry out a sufficiently thorough investigation of the incident which took place on June 12, 2004. This Court is not of the view that in every case any particular form of procedure has to be followed.

[64] It is imperative however that *“in a matter of this kind, natural justice does require not merely that a man shall have the chance to state his own case in detail; he must know in one way or another sufficiently what is being said against him. If he does not know sufficiently what is being said against him, he cannot properly put forward his own case.”*

- See the observations of Slynn J. in *Bentley Engineering Co. v Mistry* [1979] I.C.R. 47 at page 51 letter D.

[65] The Employer carried out investigations of the incident. It obtained written statements from Ms. Anthony, Mr. Johnson and Ms. Rosalyn Isaacs. It did not obtain a statement from Mr. Byers. Mr. Bigler for the Employer interviewed other persons. These included Mr. Prince and certain staff members who worked on that night. No evidence was given of the names of these other persons.

- [66] There is no evidence that the statements of Mr. Johnson and Ms. Isaacs referred to at paragraph [65] hereof were given to Ms. Anthony prior to the Employer's decision to dismiss the Employee. The Employer ought to have done this. There is no evidence as well that the Employer met with any of the parties prior to arriving at its decision to dismiss Ms. Anthony. Maybe this should have been facilitated.
- [67] The Employer however gave the Employee the right to state how the fight occurred. In addition, the statements which the Employer obtained from the two principal witnesses in general were corroborative of the matter which she put forward in her statement.
- [68] In all the circumstances of this case I am satisfied that the Employer carried out a proper investigation of the facts and circumstances of the incident which took place on its premises on June 13, 2004. Whether or not the Employer's action in dismissing the Employee for misconduct was reasonable or unreasonable is a concern which this Court shall next address.

THE DECISION

- [69] Was Ms. Anthony's action misconduct in accordance with C 58 (i) (a), (2) and C 59 (i) (a) of the Labour Code? There is an abundance of evidence in this case that Mr. Byers' behaviour towards Ms. Anthony was generally provocative in nature. Having regard to the actions of the Employee, and taking into consideration all of the facts of this case, I hold that her actions were reasonable. In all of the circumstances of this

case this Court finds that Ms. Anthony's behaviour on June 12, 2004 did not amount to misconduct.

[70] What should have been the response of a reasonable employer in these circumstances? A reasonable employer would have taken into consideration the period of service of the employee, her good conduct and the course of provocative conduct of Mr. Byers. In all of the circumstances of this case this Court finds that the Employer acted unreasonably when it dismissed Ms. Anthony. She was unfairly dismissed.

[71] Notwithstanding the conclusions of this Court, the Employee must bear some responsibility for the circumstances which led to her dismissal. I would assess this at 10%.

[72] In arriving at my decision I have taken into consideration all of the evidence, the relevant provisions of the Industrial Court Act Cap. 214, the Labour Code, and the submissions of Counsel for the Employer and the Employee.

Issue No. iii

In the event that Ms. Anthony is held to be unfairly dismissed what is the measure of damages due to her.

[73] An employee whom the Court holds was unfairly dismissed is entitled to certain awards under specific established headings. The awards to which Ms. Anthony are entitled to are as follows:

(a) Basic Award

This award is similar to severance pay. The employee was monthly paid, earning an average net sum of \$3,100.00. She worked for the Employer from August 8, 1995 until June 15, 2004. This is 8 years and 10.25 months. Her entitlement is $(\$3,100.00 \times 8) + (\$3,100.00 \times 10.25/12)$. This amounts to \$27,447.91.

(b) Immediate Loss

The efforts which the Employee made to obtain suitable alternative employment were very sparse. A period of three (3) months is awarded under this heading. The sum which is due to her is \$9,300.00.

(c) Manner of Dismissal

No award is made under this heading.

(d) Future Loss

As at the date of the trial, the Employee stated that she earned a gross monthly sum of \$2,500.00. Before dismissal she earned an average monthly sum of \$3,100.00. Using the figure of \$500.00 I award her a period of six months under this heading. A five per centum reduction from this figure is \$2,850.00.

(e) Notice Pay

The sum awarded is one month's salary or \$3,100.00.

Conclusion

[74] The Employer shall pay to the Employee the sum of \$38,428.12 on or before December 31, 2008. This represents the gross figure of \$42,697.91 less 10 per centum. There shall be no order as to costs.

Dated this 26th day of November 2008


PHILIP A. PILGRIM
President

I agree.


M. ALTHEA CRICK
Member

I also agree.


SAMUEL R. AYMER
Member

