

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 8 OF 2009

BETWEEN:

TREVOR ROMEO

Employee

and

THE EPICUREAN LIMITED
(trading as the Epicurean Supermarket)

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Mr. Lawrence Daniels - Attorney-at-Law for the Employee

Mr. Kendrickson Kentish of Lake & Kentish - Attorneys-at-Law for the Employer

2010: July 20

2011: May 26

JUDGMENT

PILGRIM, P

INTRODUCTION:

- [1] Trevor Romeo (sometimes referred to as “**the Employee**”) was born on May 07, 1980. He is 30 years of age. He resides at No. 2 Armstrong Road, Gray’s Farm in St. John’s in Antigua.

- [2] The Epicurean Limited is a limited liability company. It is registered pursuant to the Company's Act 1995 of the Laws of Antigua and Barbuda. It carries on the business of a supermarket at Woods Mall in St. John's and Jolly Harbour Marina in the parish of St. Mary's in Antigua. (I shall refer to it as **"the Employer"**).

The Employee's case

- [3] The Employee commenced working with the Employer some time in the month of September 2000. His first job was that of a packer. He started working at the Woods Mall branch of the supermarket. He performed well. The company promoted him to the position of senior packer sometime in 2004. He was transferred to the Jolly Harbour branch of the supermarket. In this position he supervised the work of four (4) female packers. One of them was Simone Knight.
- [4] For sometime during the period of his being employed at the Jolly Harbour branch of the supermarket, the working relationship between Mr. Romeo and Ms. Knight became sour. He testified that on or about January 20, 2007 Ms. Knight and her brother assaulted him. According to Mr. Romeo, Ms. Knight struck him in his face. Upon his arrival at work he reported the matter to Mr. Steve DeBruyn the Manager of the Jolly Harbour branch of the supermarket.
- [5] Mr. Romeo also stated that Ms. Knight ***"wanted to do her own thing and was not doing as instructed. In short she resisted my authority as supervisor and the person in charge of the shift that she worked on"***.

-See paragraph 4 of his Witness Statement

[6] The Employee stated that he brought the matter referred to at **paragraph [5]** above to Mr. DeBruyn's attention. Mr. DeBruyn in his evidence confirmed that Mr. Romeo reported certain difficulties which he encountered with Ms. Knight and the other workers under his charge to him. Mr. DeBruyn convened a meeting with Ms. Knight and the other three (3) workers who were supervised by Mr. Romeo.

[7] (i) On Sunday, January 28, 2007 Mr. Romeo reported for duty for the 11:00 a.m. to 7:00 p.m. shift. According to him Ms. Knight approached him in the supermarket aisle, informed him that she had previously struck him in his face and that she would do it again. He walked away.

(ii) Sometime later on during the day Mr. Romeo indicated that Ms. Knight confronted him again and repeated her intention to slap him in his face. He did not report any of these two incidents to any member of the management team because he did not wish to *"get in any trouble"*. When he was questioned by Mr. Kentish Attorney-at-Law for the Employer he could not identify the nature of the 'trouble' which would befall him if he had made his complaints known to the supermarket management.

The incident of January 28, 2007

[8] An incident occurred on January 28, 2007. On this day the Employee completed the day's work after 8:00 p.m. He changed from his working uniform into his personal clothing. He went to the outside of the supermarket. According to Mr. Romeo he stood on the outside with other staff members. Ms. Knight exited the supermarket at the front of the building. He and Ms. Knight engaged in an argument. She raised her hand

to hit him with a slap. Before she was successful he struck her in her face. He walked from the scene and went home.

- [9] Mr. Romeo indicated that this incident occurred in the vehicle parking area of the supermarket, in the presence of at least two other supermarket employees. Ms. Knight was dressed in her work uniform. No other persons were in the parking lot.
- [10] As a result of the altercation which took place on January 28, 2007 Mr. Romeo was summoned to a meeting at the Woods branch of the supermarket. He met with Ms. Carol Springer. She is the Employer's Personnel and Human Resources Manager.
- [11] Mr. Romeo testified that he informed Carol Springer of the incident referred to at **paragraph [8]** of this judgment. He did not tell Carol Springer that he hit Ms. Knight because of prior acts of rudeness or insubordination by her. Neither did he tell Ms. Springer that he struck Ms. Knight because of a prior bus station incident which involved Ms. Knight, her brother and himself. He did not plan to strike Ms. Knight on Sunday, January 28, 2007.
- [12] By a letter to the Employee dated January 20, 2007 the company dismissed him. The reason given for his dismissal was his "*physical abuse*" of Ms. Knight. Mr. Romeo was informed by the company to return its property. He was given a final pay cheque. The loan amount which he borrowed from the company was deducted from the sum which was paid to him. As at the date of his dismissal he earned a net weekly sum of EC \$640.00.

- [13] In answer to Mr. Kentish Attorney-at-Law for the Employer Mr. Romeo indicated that the appearance of blood on Ms. Knight's face *"may have come from one slap I gave to her. She may have bled because of the one slap"*.

The Employer's case

- [14] Ms. Carol Springer gave evidence for the Employer. She resides at Crosbies in Antigua and Barbuda. She is the Personnel and Human Resources Manager at the Epicurean Supermarket since 1994. She recalled having signed a Witness Statement. It was admitted as her evidence.
- [15] Ms. Springer interviewed Mr. Romeo on January 30, 2007. She asked him what transpired between himself and Ms. Knight on January 28, 2007. According to her, Mr. Romeo informed her that after Ms. Knight exited the supermarket, he punched her a few times.
- [16] Ms. Springer in answer to Mr. Daniels Attorney-at-Law for the Employee stated that he had received three written reports from Mr. Steve DeBruyn, the General Manager of the supermarket, Katharina Stevens, an employee of the supermarket and Mr. G. Thomas security guard attached to the supermarket.
- [17] Ms. Springer informed the Court that she had told Mr. Romeo that Katharina Stevens was sitting in her car in the supermarket compound where she was able to witness the incident between himself and Ms. Knight.

- [18] Ms. Springer informed Mr. Romeo of Katharina Stevens' observation that he approached Ms. Knight and punched her in her face. She did not present Mr. Romeo with copies of the reports. She read the contents of them to him. According to her the incident took place about thirty (30) minutes after the end of the day's work.
- [19] Ms. Katharina Stevens gave evidence on behalf of the Employer. She resides at Jennings Village in Antigua and Barbuda. She is employed as a supervisor. She knows Trevor Romeo. She signed a Witness Statement on July 16, 2010. She recognized it by her signature.
- [20] She informed the Court that she drove her motor car from the rear of the car park on the supermarket compound. She stopped at the front door of the supermarket after completing her duties at 8:30 p.m. She saw persons at the front column of the supermarket. She enquired if everyone has obtained transportation to their homes.
- [21] One of the four persons she saw at the supermarket's front column was Simone Knight. She saw Mr. Romeo as he exited the front door. She observed that Mr. Romeo exited the door, walked to where Simone stood and hit her three times in her face. Ms. Knight ran from where she stood into Ms. Stevens' motor car. She observed that Ms. Knight's face had bled and what appeared to be blood on her shirt.
- [22] Ms. Stevens contacted Steve DeBruyn and with his assistance, she obtained a bag of ice and put some of it on her face. Ms. Knight was also given paper towels to clean what appeared to be blood from her face.

- [23] According to Ms. Stevens, a police report was made. She arranged for Ms. Knight to be transported to the hospital.
- [24] In answer to Mr. Daniels, Ms. Stevens indicated that she did not hear Mr. Romeo and Ms. Knight being involved in any confrontation. Neither did she see Ms. Knight attempting to hit Mr. Romeo. After Mr. Romeo struck Ms. Knight he disappeared.
- [25] Mr. Steve DeBruyn gave evidence for the Employer. He resides at Pillar Rock at Five Islands in Antigua and Barbuda. He has been employed at the Jolly Harbour branch of the supermarket for the past four (4) years.
- [26] Mr. DeBruyn recalled signing a Witness Statement on July 6, 2010. He recognized his signature on that Statement. It was admitted into evidence.
- [27] According to Mr. DeBruyn, sometime after 8:30 p.m. on January 28, 2007 he was engaged in a telephone call with Katharina Stevens. He then went to find Simone Knight to ascertain whether she required medical attention.
- [28] Mr. DeBruyn obtained a bag of ice and paper towels which were used to assist her as he saw what appeared to be blood on her face. He then telephoned the police department. He arranged for Ms. Knight and her brother to obtain transportation to the hospital.
- [29] In answer to Mr. Daniels Attorney-at-Law for the Employee, Mr. DeBruyn stated that he did not show Mr. Romeo any written policy regarding fighting.

Mitigation Efforts

[30] Mr. Romeo obtained employment in or about the month of July 2007. He worked as a labourer at Sandals for between \$80.00 and \$100.00 per day for three months. He then found employment as a painter. He worked for \$120.00 per day. He is presently employed as a Warehouse Assistant with Chase Distributors. His net weekly wage is \$480.00. No evidence was led with regard to any letters or attempts made by the Employee to obtain alternative employment after his dismissal.

The Issues

[31] The following are the relevant issues:

- (i) Whether or not the Employer instituted a proper investigation of the incident of January 28, 2007.
- (ii) Whether Mr. Romeo's conduct amounted to misconduct which justified the Employer to summarily dismiss him.
- (iii) In the event that Mr. Romeo is held to be unfairly dismissed what is the measure of damages which is due to him.

Employee's Submissions

[32] Mr. Daniels for the Employee made the following submissions:

- (i) Mr. Romeo was not acting in the course of his employment when the incident occurred. He cites **Alcan (Jamaica) Ltd. V Nicholson No. 49 of 1985**. According to Mr. Daniels a welder left his area of work and went to a location called a "*precipitation area*" and there suffered

a serious eye injury. The employer was held not liable for the employee's injury.

- (ii) The events of January 28, 2007 are not of a nature which would justify the Employer to summarily dismiss the Employee.

Employer's Submissions

[33] Mr. Kentish for the Employer made the following submissions:

- (i) The **Epicurean Limited v Taylor Civil Appeal No. 4 of 2003** is authority for the proposition that an employee must be given an opportunity to answer the charges which may be brought against him.
- (ii) An attack by an employee upon another employee on the employer's premises is an act of serious misconduct which warrants dismissal.

The Law

[34] C56 of the Labour Code states as follows:

“C56. 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.”

C58 (1) (a) and (2) of the Labour Code reads as follows:

“C58 (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 C59 (1) and (2);

- (b);
- (c);
- (d);
- (e);

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

C58 (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."

C59 (1) (a) of the Labour Code reads as follows:

"C59 (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);”

[35] 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:

(i) *“[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, willful 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 established 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”

[36] *“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.

(The emphasis is the Court’s).

[37] In **Meyer Dunmore International Ltd. V Rogers** [1978] I.R.L.R. (E.A.T.) with regard to the existence of a rule which governs fights at the work place Mr. Justice Phillips who delivered 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 is the Court’s.)

[38] The authors of **Harvey on Industrial Relations and Employment Law, Butterworth, Volume 1, 2008** state at paragraph [1401] as follows:

(c) **Gross misconduct and the absence of rules**

“Although a clear set of rules is desirable, it does not follow that a dismissal will be unfair if no specific rules can be pointed to by the employer. Inevitably certain acts of misconduct are so well known that there is hardly any need for them to be spelt out”.

[39] In **Epicurean Limited and Madeline Taylor Civil Appeal No. 4 of 2003 Mr. Hugh Rawlins Justice of Appeal (ag.)** (as he then was) made reference to the legal principles which govern unfair dismissal matters. At **page 8 of paragraph [27]** he stated as follows:

“In this jurisdiction, the legal principles that relate to unfair dismissal are grounded in statute. They are contained, in particular, in Clauses 56, 58 and 59 of the Labour Code. Clause 59(1)(a) provides that an employer may terminate the employment of an

employee who is guilty of serious misconduct in relation to his or her employment. That is, if the misconduct is so serious that the employer cannot reasonably be expected to take any course other than termination. Such conduct includes but is not limited to situations in which the conduct clearly demonstrates that the employment relationship cannot reasonably be expected to continue.”

The first issue

Whether or not the Employer instituted a proper investigation of the incident which occurred on January 28, 2007.

[40] 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 principals 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 Madeline Taylor Civil Appeal 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 of the Garden of Eden.”

[41] The employer must carry out a sufficiently thorough investigation of the incident which took place on January 28, 2007. This Court is not of the view that in every case any particular form of procedure has to be followed.

[42] 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 Bently Engineering Co. v Mistry [1970] I.C.R. 47 at page 51 letter D.

[43] The Employer instituted an investigation of the incident which occurred on January 28, 2007. It obtained statements in writing from Mr. Steve DeBruyn, Ms. Katharina Stevens and Mr. G. Thomas. There is no evidence that the Employer requested a written statement from Mr. Romeo.

[44] The evidence does not disclose that any of the three statements were actually given to Mr. Romeo before the Employer dismissed him. This ought to have been done.

[45] The Employer however informed the Employee of the contents of the three reports. He was given an opportunity to state in his own words what

transpired on the night of January 28, 2007. He availed himself of this opportunity and stated verbally how the incident took place.

[46] Having regard to all of the circumstances of this case I hold that the Employer carried out a proper investigation of the events of January 28, 2007. The Employee was given an opportunity to be heard. Whether or not the Employee's action amounted to misconduct is what I shall now examine.

The second issue

Whether Mr. Romeo's conduct on January 28, 2007 amounted to misconduct which justified the Employer to summarily dismiss him

[47] It is Mr. Romeo's evidence that on the night of January 28, 2007 he engaged in an argument with Ms. Knight outside of the supermarket. She raised her hand to hit him. Before she could do so, he slapped her in her face.

[48] His evidence is at variance with that of Ms. Stevens. Her evidence is that he struck her in her face on three (3) occasions. She did not see Ms. Knight raise her hand in an attempt to hit Mr. Romeo.

[49] I listened to the evidence of both witnesses. I watched their demeanour. I also took into consideration the evidence of what appeared to be blood on Ms. Knight's face.

Disposal

[50] I do not accept Mr. Romeo's version of what took place on January 28, 2007. I hold that he launched into an unprovoked attack of violence on Ms. Knight. This action caused her to bleed profusely. His action of physical violence is a serious breach of the contractual term of employment. It is an act of serious misconduct in relation to his employment.

[51] (i) Mr. Daniels at **paragraph [32]** above submits that Mr. Romeo was not acting in the course of his employment when the incident took place. This submission has no merit. In **AF Stevenson v Golden Wonder Limited [1977] IRLR 474** the report reads as follows:

“The appellant was employed as a technical manager. He was dismissed after he perpetuated a moderately serious and unprovoked assault upon another employee at a company social function held outside working hours in the company canteen. A Scottish Industrial Tribunal found the dismissal fair.”

(ii) The employee appealed the judgment to the Employment Appeal Tribunal. Lord McDonald in delivering the judgment of the Tribunal stated at **page 475** *inter alia* as follows:

“Finally, it was submitted that the Tribunal had paid insufficient attention to two matters..... The other was that they erred in law in not holding that the place where the alleged incident took place, being outside factory premises, not being within the normal working hours was sufficient to mitigate the penalty. This proposition is not elegantly expressed but it involves that a senior responsible employee of a company should not be held too much at fault for a

serious assault on a fellow employee provided he does it in his own time and outside factory premises. This we do not accept. All these matters were fully before the Industrial Tribunal who applied their minds properly to them and cannot, in our view be said to have erred in law in respect of them.

We consider this appeal to be without merit and it is dismissed.”

(iii) In that case the Tribunal also held that *“even if the provisions of the grievance procedure had been rigidly adhered to, no different result would have been reached”*.

- See page 474.

[52] In the circumstances of this case the Employee’s misconduct was so serious that the Employer could not reasonably be expected to take any course other than termination. The Employer’s action in this regard was reasonable.

The third issue

In the event that Mr. Romeo is held to be unfairly dismissed what is the measure of damages which is due to him?

[53] In light of my findings at **paragraphs [50] and [52]** above this issue requires no determination.

[54] The Reference is dismissed. There shall be no order as to costs.

Dated the 26th day of May, 2011



PHILIP A. PILGRIM
President

I agree



ST. LAWRENCE de FREITAS
Member

I also agree



DR. HAYDEN THOMAS
Member