

ANTIGUA & BARBUDA

THE INDUSTRIAL COURT

REFERENCE NO. 14 OF 2012

BETWEEN:

IRA LOOBY

Employee

And

WEST INDIES OIL COMPANY LTD

Employer

Before:

The Hon. St. Lawrence de Freitas

Chairman

The Hon. Hayden Thomas

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Stacy Richards-Anjo, Sandy Khoury and Kivinee Knight of Richards & Co. Attorneys-at-Law for the Employer.

Dane Hamilton Jr. and Judith Dublin of James Dublin & Co. Attorneys-at-Law for the Employee

2014: April 7

September 12

JUDGMENT

De Freitas, St. L.

Background

1. By reference dated the 30th day of April 2012 the Employee Mr. Ira Looby (hereafter referred to as **Mr. Looby or the Employee**) who lives at Potters Village, St. John's

Antigua has filed a complaint to the court that he was unfairly dismissed by the West Indies Oil Company, his Employer, and that he is entitled to compensation.

2. The West Indies Oil Company (hereafter referred to as **the Company or the Employer**) operates an oil distribution facility at their premises on Friar's Hill Road, St. John's Antigua.

Proceedings

3. The Employee filed his Employee's Memorandum on the 4th day May 2012. In his Memorandum he contends that his dismissal was unfair, harsh and contrary to good industrial relations practices and seeks compensation for payment in lieu of Notice Pay, Loss of Protection from Unfair Dismissal, for Immediate Loss, for Future Loss and Loss of Fringe Benefits.
4. The Company filed their Employer's Memorandum on the 24th day of October 2012. The Company maintains that the Employee was aware of the "Employee Hand Book", that he was also aware that, where an employee used another employee's timecard to clock such other employee into or out of work, then either or both employees involved would be subject to dismissal. They further stated that employees involved, if dismissed, would then be considered discharged for cause. They further maintain that the decision to terminate was a reasonable one and that they acted reasonably in all the circumstances of the case.

The Evidence

5. Mr. Looby worked with the Company on two separate occasions, firstly from the 15th October 1981. This first employment came to an end on the 17th August 1983 when the Employer discontinued its refining operation and he was paid severance benefits.
6. The Employee commenced a new employment with the Company on the 9th February 1987 and continued in that employment until his dismissal on July 26th 2010. He had worked for almost 24 Years and had attained the position of "Group Leader".

7. His evidence was that at the time of his dismissal his salary was \$2896.00 per fortnight. That he also obtained a shift allowance of \$62.20 per fortnight and that in addition he received \$100.00 per fortnight as transportation allowance. He further contributed 5% of his earnings and the company contributed an equal amount of 5% to a thrift fund organized by the Company.
8. The Company had a system in place where each employee was required to “punch in” a time card at the beginning of their shift and again was required to “punch out” at the end of the said shift.
9. The time clock and cards were located in a small area at the entrance /exit of the Employer’s premises.
10. The Company had a policy in place that prohibited employees from “punching” each other’s time card and this policy was clearly set out in an Employees Hand Book.
11. The Employee denies ever having been given the “hand book”, during his second employment with the Company. However on cross examination he admitted that “when I was employed first in 1981 I was given a copy of the Hand Book”. He also admitted that as shift leader he knew that punching in/out for someone else was wrong. The evidence is clear that he was aware of the hand book and was familiar with the relevant section prohibiting such conduct.

The Employees Hand Book reads:

“16. Time Recording

Employees not exempted are required to record their attendance by clocking a time card which is used to determine their normal weekly earnings.

They are required to punch their time cards as noted below:

- a.
- b.
- c.

d. Upon completion of work assignment.

For your information and guidance, the clocking in and out of another employee's time card is specifically prohibited. Any employee participating in such action will be discharged for cause".

12. On the 19th July 2010 at approximately 8.00 AM and at the end of his shift the Employee was asked by a fellow employee, Mr. Richard Samuel, to punch out his (Samuel's) time card as they were both leaving the premises having completed their 12.00 Midnight to 8.00 AM shift.
13. The Employee acceded to the request and in fact did "punch out" his colleague's card.
14. Present in the vicinity of the small area where the time clock and cards were located was a Security Officer and the Payroll Clerk/time keeper. The evidence is that Mr. Samuel was in conversation with the time keeper who was standing approximately 6 feet away, when the request to punch out his time card was made.
15. The Employee's evidence is that after he had punched out Mr. Samuel's card the Security Officer had reminded him that it was against the rules to do so. The Employee also gave evidence that he had then apologized for having done so and explained that he had no intention to, and could not steal time because Mr. Samuel had just completed his shift.
16. The Employee admitted that after the Security Officer warned him that she would report the matter, he then told her that she could write whatever she wanted.
17. The Security Officer was not available to give evidence before the Court.
18. However, the evidence is that the Security Officer subsequently reported the incident to the management of the Company and the Employee was placed on suspension when he reported to work (after one week vacation) on July 26th 2010, until further notice.

19. The Employee maintains by his witness statement *inter alia* that the express prohibition against punching in and out for another employee was designed to cure and prevent the actual or potential mischief of “stealing time” whereby two or more employees would collude with each other to falsify their time card and thereby deliberately and dishonestly mislead the Employer’s Time Keeper so that a particular employee would be paid for a period of time for which he had not actually worked.
20. While the Employee was on suspension and before he was dismissed several of his fellow workers wrote a letter to the Company protesting the suspension, claiming that in their opinion the punishment (prior to the dismissal) was excessive relative to the situation and contrary to good labour practices.
21. On the 13th August 2010 the Employee was asked to report to the Company’s Personnel Manager and was thereupon dismissed by letter dated 26th July 2010.

Reason for Dismissal

22. The letter of dismissal, after having recited the facts that the employee was caught punching another employee’s time card, went on to declare that, “management had lost the trust and confidence we placed in you and subsequently must terminate your employment effective immediately”.
23. The Employee was given a cheque in the amount of EC\$25,491.18.

The Law

24. The Antigua and Barbuda Labour Code at Section C56, C58 and C59 State:
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 such employee without just cause”.
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 C 59 (1) and (2);

(b)

(c)

(d)

(e)

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

25. C58 (2) states as follows:

" (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 he 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."

26. C58 (1) (a) must be read in conjunction with sections C59 (1), C59 (2) and C59 (4). C59 (1) (a) states as follows:

C59." (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

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

(b).....

(c).....

(2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot

reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of

(a)—a repetition of the misconduct or;.....

(b)—the commission of another misconduct which is as serious as the one in respect of which the written warning was given.....

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

(4) Where within six months of the receipt of the written warning under subsection (2) the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning”.

27. In addition the Industrial Court Act (Cap 214), Sec. 10 (3) b states:

“(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

(a).....

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code. ’

28. **Matters to be determined are as follows:**

- (a) Was the Employee guilty of misconduct so serious that the Company could not Reasonably be expected to take any action other than termination?
- (b) Did the Company act reasonably in summarily dismissing the employee?
- (c) If the Employee was unfairly dismissed, what compensation should be paid to him, if any?

Employer's Submissions

29. Learned Counsel for the Company in their written submissions has made reference to several warning letters “which were all written to the Employee in regard to “multiple infractions”. Copies of these letters were also exhibited as a part of Mr. Leo Webson’s witness statement. These letters were dated since 30th January 1992 with the latest one dated 27th March 2009. The court finds that these letters do not fall within the timeframe provided in section C59 (4) of the Labour Code and that it is further unreasonable for the Employer to rely on any such alleged previous misconduct on the part of the Employee to support his present dismissal.
30. Learned Counsel for the Company referred this court to the case of **London Borough of Harrow V Cunningham [1996] IRLR 256**. This is a matter where two employees had committed the same or similar infractions on the job but were given different penalties, one was dismissed and the other received a warning letter. In our view, the question of different penalties must be considered in the context of the facts of this matter before the court.
31. Counsel for the Company further made reference in their written submissions to the case of *ASDA Stores Limited V Mrs. Sandra Malyn [2001] ALL ER D419/Appeal No. EAT/0066/00*. This case concerned the abuse of a ‘Discount Card’ by the employee. In that case the employer’s published policy regulated who was authorized to use the said card to obtain discount privileges. Unauthorized use of the discount card amounted to a financial disadvantage to the company. The employee was found to have misused the discount card. This matter also considers that where the disciplinary code (**Company’s policy**) of the employer (Employee Hand Book as it relates to this matter) stipulates that a particular act---is to be regarded as an offence of gross misconduct attracting the – possible sanction of summary dismissal, that the employer could readily ascertain the provisions of the code (Employee Hand Book).

32. It should however be noted, that the court in the above matter never appeared to have had reason to consider any statutory provision comparable to the Antigua Labour Code [Sec. C59] and the Industrial Court Act. [Sec. 10 (b)]

Employee's Submissions

33. The Court has not received any written submissions on behalf of the Employee, notwithstanding having made several requests for the same.

Summary Dismissal

34. In the matter before this court the Employee was dismissed summarily and the employer is relying on Article 15 of their Hand book which reads "For your information and guidance, the clocking in and out of another employee's time card is specifically prohibited. **Any employee participating in such action will be discharged for cause**". (The Court's emphasis)
35. However note has been taken of the fact that, notwithstanding the policy stated in [34] above, in the Witness Statement of Mr. Leo Webson, the Employer's Personnel and Administrative Officer, stated: "*The Employee's Handbook gives authority to the Employer to terminate both employees involved in an incident where one has punched the other's time card. Having taken all the circumstances into consideration including the records of both the Employee and Mr. Richard Samuel (the other employee involved) we made what we considered to be a reasonable decision in exercising our discretion in terminating the Employee*". Mr. Samuel received a five-day suspension. In evidence it was conceded by Mr. Webson that Mr. Looby's letter of termination did not include his record as a reason for termination.
36. It is clear from the circumstance of the case that there was no intention on the part of the Employee and /or Mr. Richard Samuel to steal time or in any other way to mislead the Employer to pay either of them for time that they did not actually work, taking into consideration that the alleged misconduct took place at the end of their shift (a) which both the Employee and Mr. Samuel had just completed, (b) in a very small area,

described in the evidence as a security booth of approximately 10 feet by 12 feet, in which the Time Keeper is reported to have witnessed the entire incident, the Employee was no more than 5 or 6 feet from Mr. Samuel and (c) that they were leaving the premises.

37. This however does not mean that the Employee is without fault in this matter. He clearly punched out a card of another employee knowing that it was wrong to do so (See Para 13 above) and he must take responsibility for his action.
38. In the matter of *Universal Caribbean Establishment and James Harrison* [Appeal suit No. 21 of 1993] Byron, C.J. [AG] (as he was then) stated, *inter alia* “***The Labour code was an innovative and important enactment, which made substantial changes to the industrial law of Antigua.-----In particular it created a new right not to be unfairly dismissed. This right has not been known to common law.***”
39. This right not to be unfairly dismissed is protected by the statute and is referred to in Paragraph 24, 25, 26 and 27 above.
40. The matter of summary dismissal was also considered in **Brenda Albert & Laurie Marsh vs. Woods Development Ltd (Ref. #5 of 1998)** a decision handed down in this court. The President stated *inter alia* “***Repeatedly this court has stated that Summary Dismissal should be the ultimate punishment by an employer and except for an extreme case should be applied only where all else failed***”.
41. In **Jupiter General Insurance Co. Ltd. V Schroff [1937] 3 All E.R. 67** the Privy Council *inter alia* made two observations which are to be borne in mind. ***The first is that summary dismissal is a strong measure which may be justified only in exceptional circumstances. The second is that the test to be applied in determining whether a summary dismissal was justified must vary with the nature of the business.....***
See Industrial Law (second edition) Butterworths page. 174.

42. In **Cable & Wireless Ltd. V Hill & Others** (the court of appeal). At page 129 of the judgment, **Berridge J.** stated *inter alia* that the “**burden of proof was on the company to show “just cause” for dismissing the employees and that summary dismissal constituted a “strong measure”, that “the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content”.**

Decision

43. In arriving at a decision in this matter careful consideration was given to the evidence of all parties concerned. Special consideration was given to the relevant sections of the Antigua and Barbuda Labour Code, Cap 27 and the Industrial Court Act, Cap 214 and other authorities.
44. Some of the questions this Court must determine are ;
- a. Whether or not the action of the Employee was *so serious that the Employer cannot reasonably be expected to take any course other than termination.*
 - b. Did the Employee by his actions and under the circumstances *conduct himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue?*
 - c. What are the *exceptional circumstances, if any, that would justify summary dismissal?*
 - d. Was the Employee’s action under the circumstances sufficient for the Employer to conclude that *“management had lost the trust and confidence we placed in you and subsequently must terminate your employment effective immediately”?*
 - e. Did the Employer act in *accordance with equity and good conscience, and did the Employer consider the substantial merits of the case before it, having regard to the principles and practices of good industrial relations as required by the Industrial Court Act?*

45. The act of punching out the card was done in the open and in the presence and knowledge of the Security Officer and the Time Keeper. There was no attempt by either party to hide their actions. There appears to be no evidence of fraud. The Employer was at no time in jeopardy of any material or financial loss. There was no intent to obtain secret profit or gain.
46. The Employee no doubt displayed bad judgement. In his Witness Statement his evidence is that he apologised to the security officer for having done so. This however cannot be described as “exceptional circumstances” that would justify summary dismissal.
47. It should also be noted that the act in question is not one that went to the Employee’s competence or to the execution of his duties, nor did it demonstrate disregard of a fundamental part of his duty. While the act was contrary to the Employers’ rules of conduct, it did not amount to any intention by the Employee to no longer be bound by the Employer/Employee contract.
48. The Court finds that after taking all the circumstances into account as outlined above, including the demeanour of the witnesses, the West Indies Oil Company acted unreasonably when they determined that management had lost the trust and confidence in the Employee and in its decision to summarily dismiss Mr. Looby. We find that the Employee was unfairly dismissed and is entitled to compensation.
49. As expressed above, this Court finds that Mr. Looby must bear a proportion of responsibility for his actions which led to his dismissal. In the circumstances of the case we assess his degree of responsibility to be 30% - see **Alexander Hughes v Antigua Brewery Limited [Ref. No. 35 of 2002.]**
50. An Employee who is held to be unfairly dismissed is entitled to certain awards under specific established headings. Mr. Looby’s awards are as follows:

(a) Basic Award:

The Employee was employed with the Company from the 9th February 1987 to 26th July 2010. This is a period of 23 years and 5.5 months. His last salary was (\$2896.00 per fortnight) or \$6274.67 per month. He is therefore entitled to $\$6274.67 \times 281.5/12 = \$147,193.33$.

(b) Immediate Loss

The Employee gave no evidence to mitigate his loss except to say that he is now engaged in fishing. A dismissed employee is under a duty to take reasonable steps including the starting up of his own business, to mitigate his loss – see **Antigua Village Condo Limited V Jennifer Watt** (Civil Appeal No. 6 of 1992). We therefore award him three months salary. He is therefore entitled to $-\$6274.67 \times 3 = \$18,824.01$

(c) Manner of Dismissal

Mr. Looby is not entitled to any award under this heading.

(d) Future Loss

There was no evidence that the Employee had obtained gainful employment since he was dismissed by the Company except as indicated in Para.50 (b) above. We therefore award him one month salary under this heading. Taking into consideration the principle in **Antigua Village Condo Corporation and Jennifer Watt** (Civil Appeal No. 6 of 1992) we deduct 10 per centum from this award. The net award is \$6274.67 less 10% = \$5647.20.

(e) Fringe Benefits

The Employee's fringe benefits are outlined in paragraph 7 above

- Shift Allowance we award an amount of - \$497.60
- Transportation Allowance we award an amount of - \$800.00

(f) Notice Pay

We award 2 weeks' pay in lieu of notice - \$2896.00

Sub-Total -\$175,831.14

From the above must be deducted 30% (\$52,749.34) being the
Employee's contribution (see paragraph 49 above) – the sum payable is therefore
\$123,081.80.

Total Award: \$123,081.80

Payments to be made by the 15th day of October, 2014. There shall be no order as to Costs.

Dated the 12th day of September, 2014



**HON. ST. LAWRENCE DE FREITAS
CHAIRMAN**

I agree



**HON. DR. HAYDEN THOMAS
MEMBER**

I also agree



**HON. SAMUEL R. AYMER
MEMBER**