

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 OF 2013

BETWEEN:

VERNEL THOMAS

Employee

and

NCO FINANCIAL SERVICES (ANTIGUA) LTD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Mr. George Lake, Attorney-at-Law of Lake & Kentish for the Employee

Mrs. Andrea Roberts Nicholas, Attorney-at-Law of Roberts & Co. for the Employer

**2014: March 4
June 30**

JUDGMENT

BACKGROUND FACTS

1. The Employee was employed by the Employer from 10th October 2005 to 10th September, 2010, when her services were terminated on the grounds stated in the dismissal letter dated 9th September, 2010. Her last position was that of Human Resources Manager.
2. The Employee's initial position at the commencement of her Employment was that of Payment Processor. She was promoted during her five-year tenure to the positions of Human Resources Assistant and Recruiting Manager respectively before being laterally transferred to the position of Human Resources Manager.

3. At the date of dismissal the Employee was earning a salary \$3,700.00 per month plus a travelling allowance of \$200.00 per month.
4. The Employee's duties included the compilation and maintenance of human resources records including a list of all employees; the immigration status of non-national employees; photographic identification of employees; and disciplinary proceedings against employees. It was also her duty to apply for or assist with applications for and acquisitions of work permits.
5. The Employee was on vacation for a period of time including the period of 24th August, 2010 to 5th September, 2010. She was scheduled to return to work on 6th September, 2010.
6. On or about 24th August, 2010 the Labour Department carried out an onsite investigation at the Employer's business place to ascertain the extent of its compliance with the relevant legislation, and in particular to check on the employment status of its non-national employees.
7. On or about 27th August 2010, the Employer's Facilities Manager, then acting as General Manager, telephoned the Employee in relation to the Employer's concerns arising from the Labour Department's investigation. The concerns included some related to a list of employees and their respective status.
8. Following the conversation with the then Acting General Manager, while the Employee remained on vacation, the Employer carried out a "wider review" of the Employee's office by which it made certain other discoveries on the basis of which it concluded that the Employee had committed "further breaches of the Employer's policies and procedures".
9. The Employee returned to work as scheduled on 6th September, 2010 at about 7:50 a.m. About one hour later the then Acting General Manager approached her and told her that a

decision had been taken to terminate her employment. She was required to hand over the Employer's property then in her possession and leave its premises.

10. On the 10th September, 2010, the Employee was given a termination letter dated 9th September, 2010 whereby she was dismissed under section C 59 (1) of the Antigua and Barbuda Labour Code (the Labour Code).
11. Prior to receiving the said dismissal letter, the Employee received no complaints whatsoever from the Employer about her behavior or performance.
12. These proceedings were commenced by Reference filed on 16th January, 2013, whereby the Employee contended that she was unfairly dismissed and claimed compensation for the same.

THE PLEADINGS

13. The Employee's case is set out in her Memorandum filed on January 16, 2013. As I understand the pleadings, the nub of the Employee's claim of unfair dismissal is a denial of natural justice. Paragraph 6 of her Memorandum reads:

“6. At no time did the Employee receive any written warning of any issues or problems that the Employer had with her performance, as required under Section C59 (2) of the Labour Code. At no time was the Employee brought before her Employer and told of the complaints against her and given the opportunity to answer the charges against her or been given opportunity to rectify the situation.”

14. On the other hand, the Employer's case is set out in its Memorandum filed on 31st October, 2013. Based on its pleadings, the Employer contends that there was no denial of natural justice and that the Employee's conduct fell under Section C59 (1) of the Labour Code which empowered the Employer to terminate her employment. Paragraphs 8 and 9 of its Memorandum states:

- “8. As to paragraphs 5 and 6 of the Employee’s Memorandum, it is stated that the Employee was guilty of misconduct in or in relation to her employment that was so serious that the Employer could not reasonably be expected to take any course other than termination and as such the Employee’s termination falls within section C59 (1) of the Antigua and Barbuda Labour Code. The Employee was terminated via letter dated September 10, 2010, a copy of which is attached to the witness statement as filed on behalf of the Employer.
9. The Employer denies that it failed to tell the Employee of the complaints against her or to give her an opportunity to answer the complaints. As set out in paragraph 6 above, the Employer put the complaints to the Employee and gave her the opportunity to defend herself and provide an explanation for the gross negligence and serious misconduct in the course of her duties as described above.”

ISSUES

15. The main issues arising from the pleadings are whether:
- (1) the Employee was guilty of misconduct or poor performance sufficient to justify her dismissal.
 - (2) the Employee was denied her right to natural justice?
 - (3) if there was a denial of natural justice, it was significant enough to render the dismissal unfair?
 - (4) under the circumstances, the Employer acted reasonably in dismissing the Employee?

THE EMPLOYEE’S EVIDENCE

17. The Employee’s primary evidence-in-chief is set out in her Witness Statement filed on 8th March 2013. The salient points of her evidence are as follows:
- On or about the 27th August, 2010, while on vacation I received a call from Ronald Silencieux, Facilities Manager with the Employer concerning the employment of non-nationals

- I explained my understanding of the situation and the reasons for any omissions on my part.
- On the 6th September, 2010 I returned to work as scheduled following my leave period and was informed that a decision had been made by the Management to terminate me.
- On the 10th September, 2010, I was given a termination letter dated 9th September, 2010.
- At no time did I receive any written warning of any issues or problems that the Employer had with my performance as required under Section C59 (2) of the Labour Code. At no time was I brought before my Employer and told of the complaints against me and given the opportunity to answer the charges against me nor have I been given opportunity to rectify the situation.
- Prior to receiving the said dismissal letter I received no complaints whatsoever from the Employer about my behavior or performance on the job.

THE EMPLOYER'S EVIDENCE

18. The Employer relied on the evidence of Ronald Silencieux, Facilities Manager. His primary evidence-in-chief is set out in his Witness Statement filed on 31st October 2013. The salient points of his evidence are as follows:

- On August 24, 2010, as a result of an inspection by the Labour Department, the Employer discovered that the Employee had not maintained a list of active employees as she was required to do.
- It was also discovered that there were several employees working without valid work permits and otherwise in breach of Antigua's Labour Laws.
- As a result the Employer undertook an internal audit and discovered an alarming list of violations which exposed the Employer to potential criminal sanctions and serious reputational risk.
- The Employee had failed to apply for work permits for several employees.

- The Employer conducted a wider review of the Employee's office and discovered further breaches of the Employer's policies and procedures including the failure by the Employee to keep photographic or any other form of identification of the employees
- Mr. Silencieux contacted the Employee while she was on vacation for an explanation but she failed to provide a reasonable explanation.
- The Employee's conduct exposed the Employer to the risk of criminal prosecution which could have resulted in fines or imprisonment.
- The Employee's gross negligence and serious misconduct also exposed the Employer to serious reputational risk.
- The Employer adopted the position that the Employee was guilty of misconduct in or in relation to her employment that was so serious that the Employer could not reasonably be expected to take any course other than termination.
- The Employee was terminated pursuant to section C59 (1) of the Antigua and Barbuda Labour Code.
- The Employee had behaved immorally in the course of her duties.
- The Employer put the complaints to the Employee and gave her the opportunity to defend herself and provide an explanation for the gross negligence and serious misconduct.
- The Employee had successfully covered up her gross dereliction of duty and the wide-scale non-compliance with the labour laws.
- The Employer denies that the Employee was unfairly dismissed and requests that the Employee's claim be dismissed."

LEGAL PARAMETERS

The Onus of Proof

19. Having acknowledged that it dismissed the Employee, the onus is on the Employer to satisfy the Court by positive evidence that it acted reasonably. For present purposes, I adopt the dicta of President Moe at page 3 of his judgment in Ref. No. 9 of 1988: **Wesley Wade v St. James Club Ltd.**:

“Since the Employer has admitted dismissing the Employee on these grounds they will have to justify this action and accordingly the burden of proving that the Employee was fairly dismissed rests with the Employer. This is the central issue in this case. If the Employer fails to establish it to the satisfaction of the Court, then it follows that the Employee must inevitably be deemed to be unfairly dismissed as he claims to be and is entitled to the relief sought. The Court is therefore charged with the responsibility of determining whether that dismissal was fair or unfair in accordance with Section C60 (2) of the Antigua Labour Code,.....”

20. In Industrial Court Appeal No. 1 of 1981, **Cable & Wireless (West Indies) Ltd v Dalma Hill et al**, the Court of Appeal reviewed the judgment of this Court in relation to the summary dismissal of the Respondents. At page 15 of the judgment, Berridge J.A., referring to this Court, stated:

“The Court held the view that within the ambit of Section C58 of the Labour Code the burden of proof was on the Company to show “just cause” for dismissing the Respondents and that since summary dismissal constitutes a “strong measure” the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a Civil nature requiring a standard of proof on a balance of probabilities, since the matters to be proved were of a grave and weighty nature, they would expect the evidence to be correspondingly cogent and weighty in nature and content.”

The Labour Code

21. As to the reason for dismissal, Section C10 (1), of the Labour Code provides:

“Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.”

22. As to whether or not the dismissal was fair, the Court is required to determine the reasonableness or unreasonableness of the Employer's actions by applying the test laid down in Section C58 of the Labour Code. That Section provides:

“(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) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59 (5).

(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 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.”

23. Section C59 of the Labour Code provides:

(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) behaved immorally in the course of his duties.

(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)

(4)

(5) Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee."

Natural Justice

24. In Civil Appeal No. 4 of 2003: **The Epicurean Limited v. Madeline Taylor**, while reviewing a judgment of this Court, the Court of Appeal reminded itself of the

significance of natural justice. At paragraph 33 of the judgment **Rawlins J. A.**, as he then was, stated:

“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 back to ancient times, were known in medieval precedents and reached a ‘high watermark’ 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.”

25. It cannot be gainsaid that the rules of natural justice underpin the provisions of Division C of the Labour Code. The principles are especially important in relation to sections C58 and C59 of the Labour Code. Generally, save for exceptional circumstances, before dismissal, an employer has an obligation to notify the employee of the precise allegations against him and give him the opportunity to answer them and to improve if necessary.

26. As to the significance the opportunity to answer allegations and to improve, at page 89 of his treatise, **The Law of Unfair Dismissal**, (1978, Butterworths) Steven D. Anderman asserts:

“With the exception of gross misconduct or other circumstances entitling an employer to dismiss without notice, an employer is normally expected to give a final formal warning before dismissing an employee. Although the omission of a warning will not as a matter of law make a dismissal unfair, where a warning if duly given is likely to influence the result, or if there is a real possibility that it might influence the result, its omission may well make a dismissal unfair.”

SUBMISSIONS

27. At the end of the trial Mr. Lake and Mrs. Roberts-Nicholas made helpful submissions on behalf of the parties which essentially reflected their respective pleadings. Both Counsel

declined the option to follow up with written submissions.

ANALYSIS

Issue 1: Whether the Employee guilty of misconduct or poor performance sufficient to justify her dismissal?

28. Section C 10 (1) of the Labour Code effectively makes it mandatory for the employer to give a particular and precise reason for a dismissal. If he fails to do so, then he will be barred from introducing or relying on any other reason at the trial.
29. The letter of dismissal is replete with generalizations and several vague allegations of misconduct and /or poor performance on the part of the Employee. Most, if not all of them, do not meet the statutory requirement for precision as established by Section C10 of the Labour Code. The main allegations include the following:
- failing to keep a list of active employees
 - allowing one employee to be employed in breach of the labour laws
 - failing to keep proper or sufficient records
 - hiring non-nationals who had declared their passports lost
 - employing an employee who had no work permit signed by the Employer
 - allowing documents to go missing
 - failing to keep all files complete and legally compliant.
 - misleading the Employer and the Labour Department
 - ceasing to follow policies and procedures
 - demonstrating poor judgment
 - demonstrating questionable ability to adequately perform duties
 - violating previous performance concerns
30. The only one of the above allegations which could possibly stand on its own without more is the first: failing to keep a list of active employees. On this point the Employer contradicts itself: paragraph 3 of the dismissal letter asserts that **“the list was not readily available”** while at paragraph 4 of the Employer’s witness statement and paragraph 3 of

the Employer's Memorandum state that **"the Employee had not maintained a list"**. The position in that regard was not or not successfully clarified by the Employer at trial.

31. In any event, for reasons which will be stated later, I accept the evidence of the Employee and find that she did keep a list of active employees and that the same was available on the Employer's shared electronic file.
32. Having said that about the first of the allegations, I should also say that some of the other general allegations may constitute foundations on which to ground a precise reason for dismissal. However, they are not sufficient to meet the standard set by Section C10.
33. Moreover, the allegations as formulated do not contain sufficient teeth that could meet the threshold of gross misconduct to justify a dismissal under Section C59 (1) (a) of the LabourCode. Further, there is nothing in the dismissal letter alleging that the Employee committed a criminal offence or had behaved immorally in the course of her duties. In those circumstances, I am not convinced that the Employer can successfully invoke any of the provisions of Section C59 (1).
34. In the penultimate paragraph of the dismissal letter the Employer states: **"Your actions evidence extremely poor judgment; call to question your ability to adequately perform the tasks assigned to you and violates previous performance concerns."** This statement suggests that the concerns of the Employer would have been better categorized as performance issues rather than conduct issues. This makes me inclined to conclude that it would have been more appropriate for the Employer to proceed under Section C59 (2), give the Employee particulars of her poor performance and warn her that she could face dismissal if there was any repetition.
35. Further, as to the vagueness of the Employer's position, the dismissal letter refers to the Employee's conduct as **"jeopardizing the company"** and says that there was a possibility of **"heavy fines"**. The letter also refers to violations which **"if left unrectified"** would result in heavy fines. To my mind, whether the Employee's actions

should be classified as misconduct or unsatisfactory performance is answered by the Employer itself. The Employer is asserting that the violations were rectifiable. This is an important aspect which is relevant in the context of the procedure adopted by the Employer.

36. In assessing the Employer's attempt to discharge its burden of proof that it acted reasonably, I must necessarily weigh the veracity of the evidence of the Employee vis-à-vis that of Mr.Silenceaux. Suffice it to say, I am by far more impressed with the Employee as a sincere witness. Her answers were forthright and credible. MrSilenceaux was at times evasive, argumentative and disingenuous. His body language and tone of voice when answering questions posed by Counsel and the Court left much to be desired.
37. In the final analysis, I find that the Employer has failed to discharge its burden of proving that the Employee was guilty of misconduct or poor performance. Accordingly, there was no sufficient factual basis for the dismissal under Section C59 (1) of the Labour Code.
38. The foregoing findings together with a brief statement on the reasonableness of the Employer's conduct (Issue 4) would be enough to dispose of the question of liability in this matter. However, for completeness, I go on to consider the issues regarding natural justice (Issues 3 and 4)

Issue 2: Whether the Employee was denied her right to natural justice?

39. The practical effect of the principles and rules of natural justice dictate that, given the nature, scope and gravity of the allegations in this case, the Employer had an obligation to:
 - serve the Employee with written notice with reasonable detail of the particular and precise allegations against her.
 - give the the Employee an ample opportunity to answer theallegations against her and to confront her accusers and defend herself against them.
 - give the Employee the opportunity to participate in any relevant investigation

-inform the Employee in writing of the outcome of its investigation.

40. The evidence discloses no written notice being given to the Employee about the allegations against her. What was communicated to her orally during the telephone conversation on August 27, 2010 was limited to the Labour Department's request for a list of active employees and the Department's preliminary review in which they found that one employee was in breach of the labour laws.
41. Whatever was said by Mr. Silenceaux during the telephone conversation on August 27, 2010, it is clear that at that time the Employer was not then in a position to make the several allegations which it eventually made. The complete set of allegations could only have been formulated after the Labour Department's review when the Employer carried out: (a) the internal audit of non-national employees (b) the wider review of the Employee's office.
42. I conclude that as at the date/ time of the telephone conversation, the Employer was not yet in a position to put to the Employee all the allegations against her. And even if it did put one or two allegations, I find that they were not sufficiently particularized and articulated so as to convey to the Employee the extent or gravity of the allegations.
43. There can be no doubt that the Employee was given no adequate opportunity to respond to the allegations. She was not aware of the particular allegations so had no adequate opportunity to explain her position. Moreover, she had no opportunity to confront her accusers and defend herself.
44. The Employer's evidence itself makes it clear that the Employee was not involved in the investigations which happened after the Labour Department's visit while the Employee remained on vacation. Further, it is clear that the Employee was not notified of the outcome of the investigations. In that regard, the review of the Employee's office in her absence and without notice to her is discourteous, to say the least.

45. In the premises, I find as a matter of fact that the procedure adopted by the Employer was fatally flawed. The Employee was denied natural justice. She was deprived of her right to know what exactly was alleged against her; denied the opportunity to participate in the investigations; and denied her right to confront her accusers and defend herself.

Issue 3: Whether, if there was a denial of natural justice, it was significant enough to render the dismissal unfair?

46. Based on the facts of this case, the denial of natural justice was significant. I find that the employee did not know the precise allegation or allegations against her. She certainly was not aware of the extent of the allegations. In any event, she was given no or no sufficient opportunity to answer the allegations and, if necessary, produce and/or regularize her records and/or improve her performance.
47. In the circumstances of this case, I am of the firm view that there was a real possibility that the Employer's decision would have been influenced in the Employee's favour if the Employee was presented with the written allegations against her, allowed to participate in the investigation and given the opportunity to explain or otherwise be heard in her own defence.

Issue 4: Whether, under the circumstances, the Employer act reasonably in dismissing the Employee?

48. The dismissal was akin to a summary dismissal which was unjustified in the circumstances. The action taken by the Employer was a "strong measure" taken on the basis of its vague unwritten allegations made when the Employee was absent on vacation. The decision to dismiss was harsh to say the least and substantially deprived the Employee of her right to natural justice.
49. The Employer's action in dismissing the Employee automatically attracted a "strict, persuasive and convincing" standard of proof. The Employer has failed to discharge its

burden of proof with “cogent and weighty” evidence. In effect, the Employer has failed to show “just cause” for the dismissal.

50. In the final analysis, when I apply the test established in Section C58 (2) of the Labour Code, I am constrained to conclude that the Employer acted unreasonably. It is clear in my mind that the Employee was unfairly dismissed and is entitled to compensation.

THE AWARD

51. In the premises, I award compensation as follows:

Basic Award for Loss of Protection

This is the equivalent of Severance Pay. In this case the Employee worked from October 10, 2005 to September 9, 2010 a period of 4 years, 11 months. Her entitlement is one months’ pay per year or major part thereof. The award under this head is **\$18,500.00** (\$3,700.00 x 5)

Immediate Loss

This head covers the loss for the period between the date of September 9, 2010 and the trial date March 4, 2013. The Employee testified that she was unemployed for 7 months after her dismissal. Her testimony was not challenged. I would award her the sum of **\$22,200.00** representing 6 months’ salary at \$3,700.00 per month.

Future Loss

The Employee was fortunate enough to find employment at a higher rate of pay 7 months after dismissal. At the time of trial she remained in that employment. Accordingly, I make no award under this head.

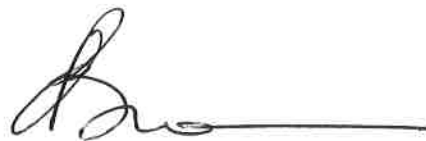
Fringe Benefits

I award the monthly sum of \$200.00 for the six-month period making a total of **\$1,200.00** under this head.

CONCLUSION

52. The total award in the sum of **\$41,900.00** (\$18,500.00 + \$22,200.00 + 1,200.00) must be paid by the Employer to the Employee on or before 31st July 2014.

Dated the 30th day of June, 2014



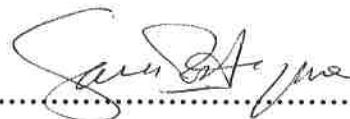
.....
CHARLESWORTH O.D. BROWN
PRESIDENT

I agree



.....
DR. HAYDEN THOMAS
MEMBER

I also agree



.....
SAMUEL R. AYMER
MEMBER