

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 18 OF 2012

BETWEEN:

DIDIER DELEAU

Employee

and

THE TIDES RESTAURANT LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

***The Hon. Althea Crick**

Member

Appearances:

**Mr. Kendrickson Kentish and Miss. Amaya Athill of Lake & Kentish, Attorneys-at-Law
for the Employee**

**Mr. Hugh Marshall Jnr. and Miss. Kema Benjamin of Marshall & Co., Attorneys-at-Law
for the Employer**

2014: March 24

2015: April 24

JUDGMENT

Brown, President

Background Facts

1. The Employee was employed under a two year contract as the General Manager of the Tides Restaurant commencing on October 1, 2010 at a salary of EC\$9,510.00. His daily hours of work commenced at 10:00 am and ended whenever the Restaurant closed.

2. By letter dated February 15, 2011 the Employer was advised that the Employer's new time clock machine was operational and that he was required "to clock in/out at all shifts." He was told that failure to comply "will result in disciplinary measures."
3. By letter dated February 15, 2011 the Employer wrote to the Employee outlining "performance and actions" by him that were "totally irresponsible and unacceptable and were a detriment to the proper functioning and services of the restaurant." The Employee was warned that "if this behavior happens again, your employment at Tides Restaurant will be terminated."
4. Prior to June 5, 2011 the Employee was granted permission from the Employer's Managing Director, Dr. Nicholas Fuller to be absent from work for period of time on that date so that he could participate in a charity golf tournament.
5. The Employee participated in the golf tournament and returned to work at about 4:30 pm on June 5, 2011 but did not "clock in" or inform the said Director in advance that he "would be late".
6. By letter dated June 6, 2011 the Employer terminated the services of the Employee on the following grounds:
 - (i) The Employee had agreed to return to work at 1:30 pm but did not do so until 4:30 pm. Therefore, the Employee was not performing his contractual duties.
 - (ii) Upon his return the Employee failed to "clock in" and was therefore not setting a proper example for his subordinates.
 - (iii) The Employee's behavior was totally unacceptable since he had been given a warning for similar behavior three months earlier.
 - (iv) The Employee was not showing "interest and concern in the restaurant" that his position as General Manager required.

The Pleadings

7. On the one hand, in his Memorandum the Employee contended that he was unfairly dismissed and claimed compensation. The grounds for his contention are as follows:

- On May 30, 2011 and again June 4, 2011 at his request, the Employee was granted permission to participate in the golf tournament on the 5th of June 2011 and to report for work at 3:00 pm.
- The Employee reported for duty at 4:00 pm, prior to which time he was in constant contact with the Restaurant. In particular he called at 10:00 am and at 1:00 pm “to ensure that the operations were running smoothly”. At 3:00 pm he also called to indicate that he would be arriving late.
- The contract of employment did not include a term requiring him to “clock in”.
- Any breach of a non contractual term does not warrant a summary dismissal.
- In the letter of dismissal, the Employee was accused of “failing to perform his duties” under the contract but it did not indicate any such specific duties.
- There was no basis in the contract for the accusation that the Employee had failed to show “interest and concern in the restaurant”.
- The Employee discharged his express contractual duties and thereby fulfilled his obligations.
- The Employee was under no contractual obligation to “clock in” or to show “interest and concern” in the business.
- The complaints against Employee did not warrant summary dismissal.

8. On the other hand, in its Memorandum the Employer contended that the Employee’s dismissal was fair and justified for the following reasons:

- The Employee was granted time off from work to attend the golf tournament on the express condition that he report for work no later than 1:30 pm.
- The Employee failed to call to notify the Employer that he would be late.
- Upon review of video footage, it came to the Employer’s attention that the Employee returned to work at 4:30 pm.
- On February 15, 2011 the Employee had received a written warning in relation to his lateness and his failure to properly organize reservations at the restaurant.

He was specifically warned that he would be dismissed if there was a repeat of such behavior.

- The issue of punctuality had been raised before. In particular it was emphasized that late attendance of employees was affecting the Employer's productivity and that tardiness would result in suspension or termination of employment.
- Although he was aware that he was required to "clock in", he failed to do so.
- The Employer had emphasized the need for the Employee to "clock in" by a memorandum in September 2010 and February 2011.
- The Employee's performance of his duties was poor and he showed a lack of interest and enthusiasm which manifested itself in a lack of commitment to his job.

The Issues

9. For convenience, I adopt the issues as substantially formulated by Counsel for the Employer, namely,
 - (1). Was the Employee's prolonged absence from work on June 5, 2011 sufficient evidence of poor performance to justify dismissal in the circumstances?
 - (2). Was the Employee's failure to "clock in" on June 5, 2011 sufficient evidence of misconduct to justify dismissal in the circumstances?

The Evidence

10. The main evidence of the Employee is contained in his Witness Statement which is consistent with and supports his Memorandum of claim.
11. As to the Employer's allegation that he failed to show interest and concern in the Restaurant, under cross-examination the Employee said that as General Manager he had to show interest and lead his team by example. He admitted being late and said that in accordance with the general practice, he called in advance to say so. He did not think he was setting a bad example. He believed that his staff could continue in his absence. The Employee also recalled the warning letter dated February 15, 2011 and expressed the view that it was not right to terminate his services on that basis.

12. In answer to questions relating to the financial affairs of the Restaurant, the Employee said he was not aware that the Restaurant was being subsidized by Dr. Fuller, the Employer's Managing Director. In particular, he said that he was not aware of any month when the Restaurant could not meet its expenses.
13. As to "clocking in", the Employee admitted that he did not and maintained that he had no contractual obligation to do so.
14. The Employer's evidence was mainly contained in the Witness Statements of Dr. Nicholas Fuller, the Managing Director and Chairman of the Board of Directors of the Employer, and Marika Nurse-Anthony, the Head Chef. Like that of the Employee, the Employer's Witness Statements were consistent with its Memorandum.
15. Under cross-examination, Dr. Fuller maintained that he terminated the Employee based on the reasons stated in the letter. He said that on the day in question the staff performed well in the absence of the Employee. He received no complaints from guests and the business was run well in the absence of the Employee. Moreover, he was not required to step in to manage the Restaurant as was the case in February 2011.
16. Dr. Fuller testified that the Employee's request for time off came during a conversation on June 4, 2011. At first he was "amazed" at the request but agreed after the Employee "pressed and pressed" and assured him that he would be at work by 1:30 pm. He specifically denied that the agreed time for the Employee to report for work was 3:00 pm. He stated that the bottom line for firing the Employee was because he was irresponsible.
17. Under Cross-examination, Mrs. Nurse-Anthony, said that the Employee had discussed with her that he would be at work by 1:00 pm. She was not aware of the Employee's intention to return to work at 3:00 pm. During the discussion with the Employee, they had agreed as to what would happen between 12 o'clock, when she was scheduled to leave, and 1:00 pm, when he was scheduled to report for work. They did not discuss

anything about him returning at 3:00 pm. Further she stated that it was OK for her to leave at 12:30 pm although the Employee was not present at the Restaurant. Mrs. Nurse-Anthony also testified that she called the Employee to let him know she was leaving.

The Submissions

18. In his oral submissions made at the end of the trial on behalf of the Employer, Mr. Kentish asserted that the Employer had just cause for the dismissal. He identified the primary reason for the Employee's dismissal to be his failure to report for work at 1:30 pm. The second reason was his failure to "clock in".
19. Mr. Kentish submitted that the Court should take the conduct of the parties in the context of the Employer's struggle to stay in business in a competitive market. He suggested that the presence of the Employee at the restaurant on June 5, 2011 was vital. Further, he suggested that the Employee's failure to "clock in" was a deliberate breach of the Employer's policy. He also noted that the Employee offered no explanation for his lateness.
20. In turn, Mr. Marshall orally submitted that the Employee was unfairly dismissed. He maintained that the Employee was not terminated for failure to perform any of his contractual duties. He also noted that the Employee's failure to "clock in" caused no loss to the Employer.
21. In her written closing submissions on behalf of the Employee, Ms. Benjamin cited **Reference No. 12 of 2007; Franklyn Francis v. St. John's Development Corporation**. In that case, the Employee failed to show up for work and did not call to explain his absence. He was warned by letter that a repetition of that kind would result in strong disciplinary action against him. Less than two weeks later, Mr. Francis arrived for work over 2 hours late. After an investigation, he was suspended for 3 weeks without pay. He was issued with a letter which warned him that any further infractions would result in the termination of his employment. Over a month later, the employee was absent from work without permission. In support of its action of dismissing the Employee, the employer

also noted that the employee had previously taken several hours of time off without permission. When the matter went to trial, the Court concluded that the misconduct was not of such a serious nature to justify dismissal and held that the employee was unfairly dismissed.

22. In his written submissions, Mr. Kentish submitted that an employee's disobedience to a lawful order or to lawful rules or policies of his employer constitute misconduct and can be a good ground for summary dismissal.
23. Mr. Kentish further noted that apart from not denying his failure to "clock in", the Employee never offered an explanation for his failure to do so. He further submitted that the Employer acted reasonably in dismissing the Employee because apart from being absent for longer than permitted, he offered no excuse. In addition, Mr. Kentish submitted that the Employee's failure to "clock in" was deliberate.
24. As to poor performance, Mr. Kentish referred to Section C59 (5) and submitted that the warning about his behavior issued on February 15, 2011 was relevant because the poor performance complained of in the dismissal letter was of the same kind. He argued that the Employee's lack of punctuality "showed clearly that he had no interest in, nor commitment to the success of the business."
25. In support of his submission on poor performance, Mr. Kentish cited the case of **Ali Arc Industries et al v. S&V Manufacturing Ltd. Et al 2001 MBQB 9S** which emphasized the implied duty of loyalty and fidelity whereby each employee is obligated to render honest, loyal and faithful service to his employer.
26. The case of **Jewellers Warehouse v. Norde AG 2006 CA 5** was also cited by Mr. Kentish in his submissions. In that case, the Court of Appeal concluded that, considering Section C59 (5) on its own, the issuance of a warning letter is not mandatory.

27. In pursuing the issue of poor performance, Mr. Kentish also relied on the pronouncement of Rawlins JA in the **Norde case** to the effect that a subjective test must be applied when considering the question of whether an Employee is capable of performing his duties. Accordingly, it was submitted that the Employer acted in good faith on a reasonable belief that the Employee was no longer capable of satisfactorily performing his duties.
28. In conclusion, Mr. Kentish submitted that the Employee's "prolonged absence from work on June 5, 2011 was sufficient evidence of poor performance to justify dismissal in the circumstances".

The Law

29. An Employee's "right not to be unfairly dismissed is established in **Section C56 of the Antigua & Barbuda Labour Code, Cap. 27**. That section provides:

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

30. **Section C58 (1) 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."**

31. It is well settled that, in instances where the employer admits dismissing the employee, the onus is on the employer to establish just cause and prove on a balance of probabilities that he acted reasonably in the circumstances. If the employer fails to satisfy the Court in that regard the employee will inevitably be deemed to be unfairly dismissed. See **Reference No. 9 of 1988 Wesley Wade v. At. James Club Ltd.**
32. Since summary dismissal constitutes a strong measure, the proof required should be strict, persuasive and convincing. The evidence of just cause must be cogent and weighty in nature and content. See **Industrial Court Appeal No. 1 of 1981: Cable & Wireless (West Indies) Ltd v. Dalma Hill et al.**

Resolving the Issues

Issue No. 1: Was the Employee's prolonged absence from work on June 5, 2011 sufficient evidence of poor performance to justify dismissal in the circumstances?

33. "Capability or qualifications" is identified in Section C58 of the Labour Code as one reasons which if assigned with a factual basis, subject to the limitations of Section C59 (5), will justify a dismissal. In determining whether this reason is properly assigned, I must necessarily consider the reasonableness of the Employer's actions.
34. At first blush, it appears that the Employee, at least up to February 14, 2011, had previously performed satisfactorily. In any event, it is common ground that the Employee was first employed under a one year contract which was superseded by the two

inference that, save for the incident in February 2011, his performance was satisfactory under the first contract and up to 8 months into the second.

35. In the warning letter dated February 15, 2011 the Employee was “put on notice that if this behavior happens again, your employment at the Tides Restaurant will be terminated”. Apart from asserting that February 14, 2011 was his scheduled day off, neither the Employee’s Memorandum nor his Witness Statement challenged the factual bases for the warning of termination. Accordingly, the warning appears to have been justified.
36. I note that the matters addressed in the warning letter were weighty and went to the heart of the Employer’s business:
- The Employee absented himself for approximately 7 hours leaving the dining room “disorganized”. As a result the owner was forced to intervene.
 - The Employee’s lack of initiative, foresight and planning resulted in an actual or potential loss of business and adverse publicity.
 - The Employee made no arrangements to take reservations for a period 3-4 hours which resulted in actual or potential loss of business.
37. In the circumstances, at the material times, it was reasonable for the Employer to label the Employee’s actions as “totally irresponsible and unacceptable, and as such were a detriment to the proper functioning and success of the restaurant”
38. As I understand them, the concerns of the Employer as at February 15, 2011 were concerns generally in respect of capability or qualification under Section C58 (1) (b) of the Code.
39. In order to determine if the dismissal was justified under Section C59 (5), I will have to answer the following question: Was the “prolonged absence” on June 5, 2011 the kind of “behavior” complained about in the warning letter. To that end, I first consider the extent and nature of the lateness. In that regard, it is common ground that the Employee had express permission to be late.

and nature of the lateness. In that regard, it is common ground that the Employee had express permission to be late.

40. Generally, in relation to time, I prefer the evidence tendered by Dr. Fuller and Mrs. Anthony over that of the Employee. I find that on a balance of probability, the Employee had agreed to return to work by 1:30pm. Accordingly, I would fix the extent of the lateness at 3 hours, less than half of the period in February, 2011.
41. Further, unlike the earlier occasion, I find that the Employee had made arrangements for things to flow smoothly in his absence. Moreover, he was in contact with the restaurant staff during his absence. In particular, I note the evidence of Ms. Anthony that sometime between 12:00 – 12:30 pm; she spoke to the Employee informing him that “everything was under control”.
42. As to the impact of his absence on June 5 relative to February 14, 2011, Dr. Fuller admitted under cross-examination that the Restaurant staff performed well during the Employee’s absence; that he had no complaints from the guests; that the restaurant ran well in the absence of the Employee; that he did not have to step in to manage the restaurant as was required in February. Clearly, the Employee’s lateness in June did not have the actual or potential adverse effect that resulted from his absence in February.
43. In summarizing the pertinent findings of fact, it is noteworthy that in June, unlike in February, the Employee:
 - (a) obtained advance permission to arrive late.
 - (b) made advance arrangements for the restaurant to function properly.
 - (c) remained in contact with the restaurant during his absence.
44. Accordingly, the Employer’s contention that the Employee was “irresponsible” would have to be considered in the context of the three hour period of his absence without permission between 1:30 and 4:30 pm. Given the facts and surrounding circumstances in

this case, that the absence of the Employee without permission for three hours on June 5, 2011 is not sufficient to cause me to conclude that he was irresponsible.

45. Mr. Kentish correctly submitted that disobedience of a lawful order of an employer or to lawful rules or policies of the employer, can lead to summary dismissal. I find no such disobedience in relation to the Employee's lateness in this case.
46. The question for the Court is this Reference is whether the Employee's "poor performance" on June 5, 2011 was sufficiently serious to justify summary dismissal. On the evidence, I am inclined to conclude that the Employee's "poor performance" was not sufficiently serious to constitute just cause for dismissal, much less summary dismissal.
47. Before my final conclusion on the issue of the Employee's "poor performance", I am obliged to consider the crucial component of procedural fairness in the circumstances. One pertinent question is: Did the Employee have a reasonable excuse for his lateness on June 5, 2011?
48. In any event, given the fundamental principles of natural justice, I am of the firm view that the Employee should have been given an opportunity to explain his lateness. An explanation or excuse could have made a difference. It would have been then left up to the Employer to accept or reject the Employee's excuse or explanation for his lateness.
49. In the circumstances, the Employer's failure to grant the Employee an opportunity to be heard is, in my opinion, an element of unreasonableness.
50. As to the timing of the dismissal on June 6, 2011, relative to the warning given on February 15, 2011, I note that Section C59 (5) permits an employer to dismiss an employee for poor performance if the Employee does not within the three month period after receipt of the warning, demonstrate that he is able to perform his duties in a satisfactory manner. It may be argued that the warning is relevant although the dismissal occurred outside the three month period. However, the Employer has not discharged the

evidentiary burden on it to prove that the Employee had failed to demonstrate that he was able to perform and had performed his duties satisfactorily between February 15 and June 5, 2011.

51. For the foregoing reasons, I resolve the first issue in favour of the Employee. The Employer has failed to discharge its burden of proof. The Employee's unauthorized absence for 3 hours on June 5, 2011 was not sufficient evidence of poor performance to justify his summary dismissal.

Issue No. 2: Was the Employee's failure to "clock in" on June 5, 2011 sufficient evidence of misconduct to justify dismissal in the circumstances?

52. As I understand the dismissal letter, the Employer's Memorandum, Dr. Fuller's evidence and the Employer's final Submissions, the Employee's failure to "clock in" constituted misconduct and was the secondary reason for dismissal. In that regard, I note the Employer's concerns dating back to October 2010. In particular, I note the contents of the memorandum dated February 15, 2011 addressed to the Employee reminding him of the requirement to "clock in" and warning of "disciplinary measures" for failing to comply with the relevant rule.
53. There is no complaint or evidence that the Employee had failed to "clock in" on any particular previous occasion. Moreover, although he was warned of possible "disciplinary measures" there was no warning of termination if he failed to comply.
54. In the circumstances, the Employer faced an insurmountable evidentiary burden to establish that the dismissal was justified upon the occurrence of the single instance of the breach of the rule requiring the Employee to "clock in".
55. I decline Mr. Kentish's invitation to conclude that the Employee's failure to "clock in" was deliberate and intended to mislead the Employer. In that regard, I note that as in the

case of alleged poor performance, the Employee was given no opportunity to explain his failure to “clock in”. An excuse or explanation could have made a difference.

56. In the circumstances, I conclude that the Employee’s failure to “clock in” on June 5, 2011 was not sufficiently serious “misconduct” to justify dismissal, much less summary dismissal.
57. I acknowledge that where the Employee’s conduct constitutes gross misconduct, he may be summarily dismissed under section C59 (1) of the Labour Code. In relation to the misconduct of the kind complained of by the Employer in this Reference, Section C59 (1) does not apply. On the evidence in this case, the failure to “clock in” is not so serious as to “clearly demonstrate that the employment relationship cannot reasonably be expected to continue”. In my view, a written warning under Section C59 (2) would have been appropriate.
58. For the reasons stated above, although I find that the Employee is blameworthy, I conclude that the Employer failed the test of reasonableness established by Section C58 (2) of the Labour Code. In the final analysis, the Employee was unfairly dismissed and is entitled to compensation.

The Award

59. In the premises, I award compensation under the respective heads to the Employee as follows:

Loss of Protection from Unfair Dismissal.

In paragraph 2 of his Memorandum, the Employee pleads that he was first employed by the Employer in October 2009 for a period of two (2) years. Although the Employer admitted that assertion, the unchallenged evidence of the Employee is that, having completed the first contract, at the date of dismissal he was employed under a two year contract which commenced on October 1, 2010. In the absence of evidence that a gratuity was paid at the end of the first contract, there is merit in Miss. Benjamin’s submission that because he worked for approximately 1.5 years, he is entitled

to \$14,265.00 being \$9,510 (monthly salary) x 1.5. In that regard, I find that the Employee's employment commenced in October 2009 and continued seamlessly for approximately 1.5 years. Accordingly, **I award the sum of \$14,265.00 under this head.**

Immediate Loss

It is well settled that an Employee who is dismissed has a duty to mitigate his loss. I am not convinced that the Employee made adequate attempts to mitigate his loss for the periods between his dismissal and the dates of commencement of his subsequent employment. In the circumstances, **I award him the sum of \$28,530.00**, the equivalent of 3 month's salary for the initial period when he remained unemployed. **In addition, I award the sum of \$10,530.00**, being the difference between his salary of \$6,000.00 which he earned at Cloggy's and the amount paid by the Employer for a period of 3 months. $(\$9,510.00 - \$6,000.00) \times 3$. Given that the Employee's contract was scheduled to expire on the 30th September 2012, **I also award a further sum of \$12,690.00** representing nine times the difference between his salary (US \$3,000.00) at the date of trial and that which he received from the Employer. $(\$9,510.00 - \$8,100.00) \times 9$. **The total award under this head is \$51,750.00.**

Future Loss

The evidence disclosed no basis for an award beyond the 2 year period of the contract.

Manner of Dismissal

The evidence disclosed no basis for an award under this head.

Exemplary Damages

The evidence disclosed no basis for an award under this head.

The Employee's Contribution

60. Having carefully considered the evidence, the submissions of Counsel, the authorities cited and the overriding provisions of the Industrial Court Act, I am obliged to consider the extent to which the Employee contributed to his dismissal.

61. I find that the Employee was aware of the Employer's concerns relating to:

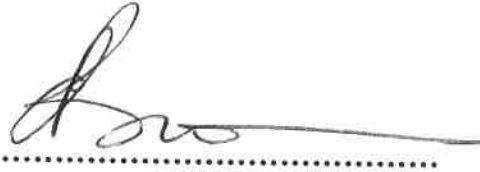
- a) his implied duty of loyalty and honesty;
- b) his obligation to act in the best interest of the Employer;

- c) the financial status of the business;
- d) his previous “irresponsible and unacceptable” conduct;
- e) the repeated reminders about compliance with “clocking in” rule;

By his conduct on June 5, 2011, the Employee failed to demonstrate adequate or sufficient regard for those concerns and thereby contributed to his dismissal.

62. In the circumstances I assess the percentage of the Employee’s contribution to his dismissal to be 50%. Accordingly, The total award in the sum of \$66, 015.00 (\$14,265.00 + \$51,750.00) is reduced by 50% to \$33,007.50.
63. **The Employer shall pay the said sum of \$33,007.50 to the Employee by 29th May, 2015.**

Dated the 24th day of April, 2015



**CHARLESWORTH O.D. BROWN
PRESIDENT**

I agree



**ST. LAWRENCE DE FREITAS
MEMBER**

***The Hon. Althea Crick, Member, died on 29th November, 2014 before settling the final draft of this Judgment.**