

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 68 OF 2013

BETWEEN:

MICHELE LONGFORD

Employee

and

INTERNATIONAL GENERAL ENTERPRISES LTD.

t/a INTERTOPS LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Samuel Aymer

Member

Appearances:

Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers Federation for the Employee

Mr. Loy Weste and Lisa Weste of Thomas John & Co., Attorneys-at-Law for the Employer

2014: November 5

2015: June 2

JUDGMENT

Brown, President

Background Facts

1. The Employee was employed by the Employer as a Customer Service Representative with effect from December 2011 at a monthly salary of \$3,500.00.
2. The terms and conditions of employment are largely set out in the Contract of Employment dated February 20, 2012. In respect of internet usage, page 5 of the Agreement provides:

"INTERNET USAGE

The Employee agrees to keep their personal Internet usage to an acceptable level. Surfing on the Internet should only be conducted during the Employee's lunch/evening break.

Infringement or abuse of personal Internet usage will result in the loss of this privilege or in extreme cases could lead to disciplinary procedures being taken against the Employee."

3. In addition, as to electronic mail, page 6 of the Agreement provides:

"ELECTRONIC MAIL

Electronic mail should be used for official Intertops.com business only. Employees should understand that electronic messages are not secure and therefore should not be assumed to be private."

4. Page 6 of the Agreement also deals with unsatisfactory work performance and standards of conduct. In that regard, it provides:

EXAMPLES OF UNSATISFACTORY WORK PERFORMANCE

Employees of Intertops.com are expected to perform their work satisfactorily and maintain excellent standards of conduct. The following examples of unsatisfactory work performance or poor conduct may result in disciplinary action or dismissal. Since it is impossible to identify every possible violation of the standards of conduct, the list below is simply illustrative and is not at all inclusive. Thus, if the management of Intertops.com determines that any employee behavior or performance (not on the list) violates the standards of satisfactory work performance, the employee may be subject to discipline up to and including dismissal.

...

- . Rude, discourteous behavior**
- . Personal use of company property or equipment...."**

5. Further, as to grievance procedures, page 7 of the Agreement provides:

"GRIEVANCE PROCEDURE

Under normal circumstances, employees should discuss job related problems, questions and complaints with their supervisor. The most appropriate solution will often be reached at this level. If this initial contact does not resolve the matter, the complaint should then be referred to the human resource manager.

Complaints that cannot be resolved through the administrative structure or department should be submitted to the appropriate official for additional efforts to achieve a settlement.”

6. During the course of her employment, the Employee was authorized to use the Employer’s electronic messaging system known as “Spark” for internal communications with her colleagues primarily for the exchange of customer information and related purposes.
7. On or about March 12, 2013 the Employee became dissatisfied with the Employer’s decision to reschedule her “day off” from March 17 to March 16, 2013. As a result, she expressed her dissent and related concerns to her manager Arlington Farquhar, the Employer’s Casino Manager (Farquhar) and Elroy Joseph, her immediate Supervisor, (Joseph) with a view to having her previously scheduled “day off” restored. The Employee was assured that the decision would be reviewed and that steps would be taken to address her grievance.
8. On March 12, 2013, while the resolution of the Employee’s grievance remained pending, she used “Spark” to engage in an electronic conversation with her colleague Melissa Francis. They exchanged 173 messages over a period of 2 hours and 43 minutes.
9. Selected excerpts from the transcript of the conversation are as follows:

“[10:43PM] Michelele: I am so fucking pissed of it
[10:43 PM] Michelele: is not even funny
[10:43 PM] Michelele: this place is so full of fuck
...
[10:44 PM] Michelele: dem fucking crazy?
...
[10:44 PM] Michelele: me just tell al by the hook or the crook I will not be in here on sun
[10:47 PM] Michelele: I told him I’m gonna be real with u there is no way on earth I would give up my family so someone to go and drink rum
...
[10:47 PM] Michelele: this is ludicris
[10:51 PM] Michelele: I told him I would not be participating in this nonsense

[11:16 PM] Michelele: ok this is the final draft I added something
[11:16 PM] Michelele: Hello Elroy

It was brought to my attention that my day off which would have been on Sunday 17th March was taken away and switched to Saturday 16th and I am now scheduled to work. I am not happy or in agreement with this change as I had plans for Sunday and although we are trying to accommodate a staff lime no one approached me about whether I had anything planned but rather my days where switched without prior notification. I find this action quite unfair frankly as when we as staff switch days off or our schedules were changed we are asked prior which not the case is.

I have spoken to Arlington about this who has assured that he will have a look at this issue I would appreciate a response once this issue has been reviewed.

Regards,

...
[11:25 PM] Michelele: yh let them put that shit on file

....
[12:53 AM] Michelele: fuck in ya a dem poor running of a business

...
[12:53 AM] Michelele: but this is absolute height if incompetence
[12:53 AM] Michelele: Arlington run in here like a doll house

...
[12:54 AM] Michelele: yes and I really don't fucking care if he gets upset art this email

...
[12:56 AM] Michelele: Arlington is such a fucking ass

...
[12:57 AM] Michelele: trust me if he come at me with this shit
[12:57 AM] Michelele: I will ask him if that even make any sense

...
[1:04 AM] Michelele: it's utter fucking nonsense

...
[1:04 AM] Michelele: like I said to him there is NO WAY ON GOD'S GREEN EARTH I WOULD GIVE UP MY DAY OFF WITH MY CHILD TO SOMEONE WHO WANTS TO GO OUT AND CAROUSE AND DRINK RUM

[1:05 AM] Michelele: that's exactly what I said
[1:05 AM] Michelele: I told him not a way in hell I give up my Sunday

...
[1:07 AM] Michelele: I hardly ask for switches I mussa ask once if not twice

[1:07 AM] Michelele: so how they go fucking do me that

....

[1:08 AM] Michelele: yes u r different
[1:08 AM] Michelele: cause u are not an asshole
 ...
[1:13 AM] Michelele: who the fuck else na

[1:14 AM] Michelele: when she ppl a work she do all kind of fuck
 ...
[1:14 AM] Michelele: chups she ugly rass
 ...
[1:14 AM] Michelele: wa mek Arlington na pay attention to that shit
[1:15 AM] Michelele: instead of beach lime and drinking rum
[1:15 AM] Michelele: fuck man
[1:15 AM] Michelele: im so on my back foot

[1:16 AM] Michelele: all a them in ya cause suck fucking monkey dick
 ...”
 ...

10. On March 14, 2013 the Employee attended a meeting with Mitchell Rathbone, the Employer's Operations Manager (Rathbone), Carol Samuel, its Human Resources Manager (Samuel) and Farquhar. During the meeting Farquhar apologized to the Employee and gave his undertaking to review the matter of the change of the Employee's work schedule.
11. The Employee was required to attend a second meeting on March 14, 2013 by which time the Employee's earlier "Spark" conversation with Melissa had come to the attention of the Employer. When the Employee was presented with a transcript of the conversation, she admitted making the several statements contained therein. The Employer expressed its concerns about the content of the conversation and improper use of its equipment.
12. By letter dated March 15, 2013 the Employee's services were terminated on the grounds of her personal use of the Employer's equipment and her discourteous behaviour. In the dismissal letter the Employer noted its strong disapproval with the Employee's conduct during her working hours and the improper personal use of its equipment. Moreover, the Employer stated that its action of dismissal was being taken pursuant to Section C 59 of the Antigua and Barbuda Labour Code (the Labour Code).

The Pleadings

13. The Employee's case was set out in her Memorandum filed on December 31 2013, by which she contended:

- At the material time the Employee was having a conversation with her personal friend and was not aware that the "Spark" system had the capacity to record written messages that could be accessed by the Employer in complete transcript form.
- The Employee was not made aware that "personal" conversations with her colleagues at work could possibly lead to any form of disciplinary action.
- Under the circumstances, the dismissal of the Employee is contrary to law and good industrial relations practices and amounts to unfair dismissal.

14. On the other hand, the Employer, by its Memorandum filed on April 2 2014, contended:

- The "Spark" system of communication was improperly used by the Employee to embark on an expletive riddled tirade to castigate and denigrate the Employer, its managers, her supervisors and colleagues.
- The Employee was guilty of misconduct in relation to her employment which was so serious that the Employer could not reasonably have been expected to take any course other than termination of her employment.

The Main Issue

15. The main issue for determination by this Court is whether the Employee's electronic messages on March 12, 2013, as evidenced in the transcript, constituted misconduct for which the Employer was entitled to dismiss her.

The Labour Code:

16. **Section C58 of the Labour Code** provides for the fair dismissal of an employee if he is guilty of misconduct within the limitations of section C59(1). Those sections provide:

“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)**

(2) The test generally, for deciding whether or not a dismissal was fair is whether or not, under the circumstances, the employer acted unreasonably or reasonably.....and the test shall be whether the actual circumstances which existed....would have reasonably led to the employee’s dismissal”

“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; ”**

The Industrial Court Act

17. **Section 10 (3) of the Industrial Court Act** provides:

“(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) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of persons immediately concerned and the community as a whole;**
- (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.”

Implied Terms of the Employment Contract:

18. Quite apart from express terms, there are implied terms imposed by law which are incidental to every contract of employment. One such term imposes an obligation of mutual trust and confidence between employer and employee. See **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666** and **Lewis v Motorworld [1986] ICR 157**,
19. In **Neary v. Dean of Westminster [1999] IRLR 288** Lord Jauncey applied the **Lewis** case and held that:

“Summary dismissal would be justified if the employee had behaved in a manner so inconsistent with the employment as to undermine the fundamental duty of trust and confidence....”

Resolving the Main Issue

20. The relevant terms of the contract of employment is a good starting point. It is obvious that the Employer clearly communicated its policies regarding internet usage, electronic mail, unsatisfactory work performance, standards of conduct and the resolution of grievances. There is no reason to doubt that the Employee was fully aware of these policies.
21. The critical evidence of the Employee is substantially reflected in the Background Facts summarized at paragraphs 1 to 12 above. It was common ground that the transcript admitted into evidence was an accurate reflection of the actual messages sent by the Employee.
22. While giving testimony, the Employee appeared to be an intelligent and forthright person who fully appreciated the nature and content of the terms and conditions of her employment. In particular, she understood the grievance procedure and

had set it in motion on March 12, 2013 with her complaints to Joseph and Farquah. The latter promised to “look into the issue”.

23. Further, the Employee appeared to appreciate the full meaning and significance of her expressions in the several electronic messages. Under cross examination, she bluntly and unapologetically admitted uttering the offending expressions, using the Employer’s software on the Employer’s computer while she was at work on the Employer’s premises. When selected expressions she made were put to her she admitted that they were inappropriate.
24. I accept the evidence of Samuel that the Employer’s employees were routinely allowed to use its computer system to exchange pleasantries and personal salutations. Samuel distinguished between the personal use and the improper use of the computer. According to her, the Employer’s concern was not so much about personal use, per se, but more about the improper personal use.
25. Given the nature, purpose and use of “Spark”, the Employee should have known that at least her supervisors and managers were potentially privy to the content of all the messages on that system. Rathbone testified that that since “Spark” was a customer service software, it was the job of management to review all the taped messages. In my view, management’s role in that regard is reasonable. I would be surprised if such reviews were not carried out routinely.
26. As far as Samuel and Rathbone were concerned, by uttering the offending words, the Employee was being discourteous to them, her co-workers, supervisors and managers. They shared the view that, by her conduct, the Employee had “castigated and denigrated” the Employer’s managers and staff alike.
27. The Employee explains her conduct by stating that she was “extremely frustrated” by the actions of the Employer and had a “personal conversation” with her friend and work colleague using “the normal means of communication at work”. I see no reason for frustration but even if she was, there is a time and place for everything. The Employee’s conversation with Melissa, as recorded in

the transcript, happened at the wrong time, using the wrong means and at the wrong place. Her utterances cannot constitute “normal communication” at work or the type of communication to be effected by “normal means”.

28. Section C59 (1) of the Labour Code clearly empowers an employer to dismiss an employee if two conditions are met. **Firstly**, the employee must be guilty of **serious** misconduct. **Secondly**, the employer must **reasonably** form the view that he has **no choice** but to terminate the employment relationship.
29. “Serious misconduct” is not defined in the Labour Code. However, based on human experience generally and employer / employee relations in particular, there can be no doubt that misconduct may be classified as gross, serious or ordinary. On the facts in this Reference, I do not hesitate to categorize the Employee’s conduct as serious misconduct. Having reached that threshold, the more challenging task is to assess the reasonableness of the Employer’s action in response.
30. In his written submissions after trial, Loy L.A. Weste, Counsel for the Employer referred to **Antigua and Barbuda Industrial Court Reference No. 22 of 2010 Royette Mendes v Complete Security Services Inc.** and reminded the Court that its duty is to decide upon the reasonableness of the action taken by the Employer and not to substitute its own view as to what the Employer should have done. The Employer’s action is an exercise of its discretion. The decision to dismiss should be upheld provided that it falls within a band of responses open to an employer acting reasonably in the circumstances.
31. In assessing the reasonableness or unreasonableness of the Employer’s decision to terminate, I am mindful of the express terms and the obvious overall thrust of the employment agreement set out in part above. The Employee had **agreed to keep her personal Internet usage to an acceptable level.** I interpret this clause widely to include not only the duration of usage but also the type of usage.

32. The Employee herself admitted that her expressions were inappropriate. In my view, given the duration and content of her electronic conversation, the Employee's personal usage of "Spark" was well beyond a reasonably acceptable level. I find that she was in breach of that clause of the employment agreement.
33. Perhaps most instructively the employment agreement provided that electronic **mail should be for official Intertops.com business only**. Moreover, the Employee was reminded that **"electronic messages are not secure and therefore should not be assumed to be private."** The Employee was also in breach of this clause. Her messages were far from being official business or in furtherance of official business. Moreover, it appears that she ignored the clear warning and made the unfortunate assumption that her conversation was private.
34. The Employer also expressly warned the Employee that **"unsatisfactory work performance or poor conduct may result in disciplinary action or dismissal."** The Employee was given specific examples and warned that if her **"behavior or performance violates the standards of satisfactory work performance, the employee may be subject to discipline up to and including dismissal."** Two of the specific areas of misconduct listed by the Employer were: **"Rude, discourteous behavior"** and **"Personal use of company property or equipment"**. There is no doubt that the Employee used the Employer's equipment to be rude and discourteous.
35. Based on the express terms of the employment agreement, the Employer was entitled to either dismiss the Employee or administer a less severe form of disciplinary action. Obviously, the Employer exercised its discretion by electing the most severe punishment within the expressed range. It follows that the question as to whether the Employer acted reasonably or unreasonably must necessarily turn on the Employer's own assessment of the nature of the Employee's misconduct and its real, potential or perceived effect on the employment relationship.
36. My consideration of the Employee's conduct must be done in the context of the facts and surrounding circumstances. In that regard, the Employee's serious

misconduct occurred after she had already set the Grievance Procedure in motion, after which she was assured that the Employer would review the matter. In her own words, the Employee felt assured the the change in her schedule of which she complained would be voided.

37. Some types of misconduct go to the heart of the contract and erode or destroy its foundation so that “ the employment relationship cannot reasonably be expected to continue”. That is the essence of Section C59 (1) of the Labour Code.
38. In my view, apart from the statutory provisions, it is clear that the Employee/s conduct amounted to a breach of the fundamental implied term imposing the mutual obligation of trust and confidence on the parties. In considering this breach, I ask the question : What was the effect of the Employee’s misconduct on the mind of the Employer?
- 39.. Both Rathbone and Samuel, using apparently rehearsed words, considered the Employee’s utterances to be an “expletive riddled tirade” used to “denigrate her managers, supervisors, employer and staff members”. According to them, the Employee “castigated and denigrated management and staff alike”. Further, they said that the Employee’s conduct was “unacceptable and was degrading and disrespectful to other members of staff and the Employer”.
40. I find that the inherent nature of the misconduct resulted in a breach of the fundamental implied term imposing a mutual obligation of trust and confidence. Thereafter, the Employer could no longer repose the trust and confidence in the Employee to sustain or restore the employment relationship.
41. In the final analysis, the Employee’s conduct constituted serious misconduct under Section C58 and C59(1) of the Labour Code. The Employer formed “the view that the Employee had been guilty of misconduct in relation to her employment which was so serious that the Employer could not reasonably have been expected to take any other course other than termination of her employment status.”

42. For completeness, I move on to consider whether there are any related facts or surrounding circumstances that could mitigate against the Employee's dismissal.
43. I have already concluded that the Employee's alleged frustration provided no justification for her misconduct. Apart from saying she was frustrated, the Employee also said that she was shocked when shown the transcript; that she did not know that the Employer had the capacity to and had been recording her messages. Further, she said that she was never told that she could be fired for having a personal conversation with her colleague at work.
44. In my view, the Employee's position is untenable. I find no reasonable excuse or explanation that could justify the nature, extent and duration of her misconduct in light of the expressed terms and conditions of her employment

Conclusion

45. Considering the range of possible human reaction in the circumstances, the Employer/s characterization of the Employee/s conduct was fair. In the end, the Employer understandably exercised its discretion by taking the most severe course of disciplinary action. The Employer had a good reason for dismissing her under Sections C 58 (1) and C59 (1) of the Labour Code.
46. Further, I also conclude that the Employer acted reasonably in treating the Employee's misconduct as sufficiently extreme to justify her dismissal. In effect, the Employer has passed the test established in section C 58 (2) of the Labour Code.

47. For the reasons stated above, I resolve the main issue in favour of the Employer and dismiss the Employee's claim with no order as to costs.

Dated the day of June, 2015



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

I agree.

.....
HON. DR. HAYDEN THOMAS
MEMBER

I also agree



.....
HON. SAMUEL AYMER
MEMBER