

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 20 OF 2012

BETWEEN:

ROY HECTOR

Employee

and

COLIN ABBOTT t/a ABBOTT'S CONSTRUCTION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence de Freitas

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Mr. Cosbert Cumberbatch of Cumberbatch & Associates, for the Employee.

Mr. Septimus Rhudd and Jermaine Rhudd of Rhudd & Associates, for the Employer.

2014: October 27

2016: February 10

JUDGMENT

Brown, P:

Background

1. The Employer is a building contractor conducting business as Abbott's Construction. The Employee's employment with him as a Carpenter / Foreman commenced on October 01, 1999. As at November 01, 2009 he was earning \$1,500.00 per week.
2. On November 01, 2009 the Employee was suspended on the grounds that: on October 31, 2009 he had the smell of alcohol on his breath after being verbally warned for the "same smell" on October 28, 2009; that his timekeeping was deplorable; and that he had been late for work fifteen (15) times during the previous month. The period of suspension was indefinite and would last until further notice so that the Employer could decide what action to take.



3. Despite his inquiry by letter dated February 10, 2010 as to whether he had been dismissed or would be recalled, the Employee received no further notice from the Employer and was never recalled.

The Employee's Memorandum

4. In his Memorandum filed on November 8, 2013, the Employee stated that: he had given satisfactory service for the 10 years of his employment; that he never received any letter of warning about any aspect of his work; and that there was no record of any misconduct on his part. He claimed that he had been unfairly dismissed and was entitled to compensation under the following heads:
 - a) Damages for unfair dismissal
 - b) Payment in lieu of Notice
 - c) Compensation for loss of Protection
 - d) Loss of earnings
 - e) Any other relief the Court may deem fit.

The Employer's Memorandum

5. In his Memorandum, the Employer denied that the Employee was unfairly dismissed. In that regard, he stated that the Employee reported for work on the 28th October, 2009 with the smell of alcohol on his breath for which he was warned. The Employee was also warned about his poor time keeping. On October 31, 2009 the Employer found that the Employee had the "same smell of alcohol" on his breath.
6. At paragraphs 6 and 7 of his Memorandum the Employer stated:
 - "6. As a result of the Employee's poor time-keeping, which had amounted to being late on fifteen (15) occasions, during the month of October 2009, the Employer suspended the Employee.
 7. During the course of the said suspension, the particular job on which the Employee was employed ended and the Employer opted not to recall the Employee to work."

The Issues

7. The main issues for determination in this Reference are:
 - (1) Whether the Employee was unfairly suspended.
 - (2) Whether there was a temporary termination of the Employee's employment.
 - (3) Whether the Employee was unfairly dismissed.

The Evidence

8. In his Witness Statement the Employee referred to the warning / suspension letter dated November 1, 2009 exhibited with his Memorandum. The instructive text of that letter is as follows:

“ Re: Warning Letter

Dear Roy,

I am handing you this letter as a written warning, concerning your behavior and time keeping on the job site at Jumby Bay. On the 28th October 2009 You were found to have the smell of alcohol on your breath and when questioned about it replied it was just a small drink you had taken for one of the guys birthdays you as a supervisor should be aware that Abbott's Construction has zero tolerance for alcohol within working hours and this is a dismissible offence after warning you verbally about this and your timekeeping you was found to have the same smell of alcohol on your breath approximately 3 days later 31st Oct 2009 when questioned your reply was you had been out the night before and the smell was caused by that. This is unacceptable and detrimental to my business. Your timekeeping is deplorable and you have been late for work 15 times for the month of October alone you leave me with no option than to suspend you until further notice so I can decide what action to take. You have a responsibility to set an example for the other workers and to be attentive at all times, which in your supervisory position, is expected.”

9. Further, the Employee referred to his letter to the Employer dated February 10, 2010. The text of that letter is as follows:

“Dear Sir,

For many years I have worked with you at Abbott Construction. I have worked with you since 1999 and have been your general foreman and most senior employee. I have given good and faithful service over the years.

On 1st November 2009 you gave me a letter of warning and suspended me for allegedly using alcohol on the job and for loitering. Four months have passed since that letter of warning was issued to me and I have not been recalled. I have not been given an opportunity to respond to the accusations you have made against me.

I need to know at this time what my position is with Abbott Construction. Is it your intention to recall me or have I been dismissed? If I have been dismissed you have not said so. I would therefore like you to clarify my position.”

10. The Employee testified that he had been Foreman for 7 of the 10 years of his employment. He said that he agreed that the Foreman had to set a good example for the other workers. He denied that he was intoxicated or drunk on the job. Specifically, he denied drinking rum from a teacup on the job. Further, he denied being customarily late or being late 35 times during the month of October 2009.
11. As to his efforts to mitigate his loss, the Employee testified that after his suspension he did not find a job as a Foreman but occasionally found work as a carpenter on a day to day basis, for which he was paid \$150.00 or \$200.00 per day. In addition, he occasionally worked on a job by job basis for which he would be paid larger lump sums. He continued that at the date of trial he was constructing a roof at Golden Grove from which he would earn \$3,000.00. He also testified that after his suspension he sometimes remained unemployed for periods of up to two or three months at a time.
12. For his part, the Employer testified that several “verbal warnings” were issued to the Employee but that there was no prior warning letter. He also said that after the suspension he did not recall the Employee to work and never intended to do so. He admitted telling the Employee that he was fired but never issued a dismissal letter. The Employer also admitted receiving the Employee’s letter of inquiry dated February 10, 2010, approximately three and a half months after the suspension. He said that he did not respond to the letter because the Employee had failed to treat him with respect.
13. When pressed under cross examination, the Employer admitted that it would have been better to issue a warning letter before the suspension but he did not do so because he had pressures on him including domestic pressure so he did not have the time to follow all the usual processes. The Employer also stated that, apart from lateness, the Employee gave good service.
14. Daniel Owen testified on behalf of the Employer. He stated that he saw the Employee drinking rum from a tea cup on the job and came to the conclusion that he was intoxicated. He also said that he saw the Employee driving the Employer’s backhoe while he was drunk.

The Law

15. **Section C58 of the Antigua and Barbuda Labour Code, Cap. 27, (the Code) deals with reasons that justify dismissal. Section C 58 (1) (a) provides:**

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) ...**

16. **Section C58 (2) provides the statutory test as to whether or not an employee was unfairly dismissed in the following terms:**

- 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.....”

17. Section C59 (2) of the Code provides:

- (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 warning was given.

18. Section B 3 of the Code provides:

“Suspension” means a temporary lay off from work for no more than four weeks with or without pay as a penalty or pending investigation of the employee’s alleged misconduct’

19. Section C 9 of the Code provides that in cases where section C 59 (2) applies:

// “C 9”

- 3) The employer must give advance notice to the affected employee of an intention to terminate that person’s employment as follows:

- (a)...
- (b) ...The period of said advance notice shall be at least equivalent to the interval of time between the affected employee’s paydays”

20. Division C, Part 4 of the Code deals with the payment of severance pay when an employee’s employment is terminated for reasons of redundancy. Under this Part, Section C 42 deals with temporary termination of employment. It provides:

- “(2) If the termination be stated as temporary, no severance pay need be -remitted to the terminated employee at the time of termination;
Provided however that
(b) If no date of recall is given at the time of termination severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled”

Resolving the Issues

Whether the Employee was unfairly suspended:

21. The smell of alcohol on the Employee's breath is, by itself, not sufficient to establish that the Employee was drinking alcohol on the job. In that regard, it is interesting to note that the warning / suspension letter did not allege that the Employee was actually drinking on the job as testified by Mr. Owen. Moreover, no allegation was made in the letter that the Employee reported for work in an intoxicated state or became intoxicated while on the job. For those reasons, we placed little weight on Mr. Owen's evidence on those points.
22. We find as a matter of fact that the Employee reported late for work on several occasions. However, in light of the provisions of Sections C 58 and C 59 of the Code, the lateness as disclosed on the Employer's records, does not justify the suspension without prior written warning.
23. Based on the evidence, we find it noteworthy that the Employer omitted to carry out any proper investigation or disciplinary proceedings to allow the Employee to state his explanation or defence in respect of the smell of alcohol or his documented lateness. In effect, there was a denial of the Employee's right to natural justice.
24. In any event, it is clear that the Employer himself did not consider the Employee's conduct to be sufficiently serious to warrant dismissal. Moreover, the Employer stated under oath that during his tenure of 10 years "Mr. Hector was a satisfactory employee on the whole – apart from the lateness". In the circumstances, the Employer failed to discharge his statutory obligation to issue a warning letter under Section C 59 (2) of the Code. Needless to say, the "verbal" warning given on October 28, 2009 could not suffice.
25. The suspension was stated to be for an indefinite period "until further notice" so that the Employer could decide what action to take against the Employee. Having effected the suspension, the Employer had a duty to ensure that it did not go beyond the statutory limit of four weeks under section B 3 of the Code.
26. For the foregoing reasons, we feel compelled to find that the Employee was unfairly suspended.

Whether there was a temporary termination of employment.

27. Having effected an unfair suspension and having failed to keep it within the statutory limit, it follows that on the 29th day after the suspension took effect, the Employee's employment was effectively terminated by the operation of law. The question arises: could this termination be characterized or be treated substantively as a temporary termination under section C 42 of the Code.
28. Based on the evidence before us, we believe that a consideration of this question is relevant in light of the Employee's letter dated February 12, 2010. It is clear that the Employee offered to treat with the Employer as though he had been simply laid off. In fact the Employee requested that the Employer clarify his position by telling him if he had been dismissed or if he would be recalled.

29. In relation to this issue, we accept the Employer's evidence that at the date of suspension the particular job was scheduled to come to an end in the following month of December. The evidence is that other work became available subsequently for which the Employee could possibly have been recalled.
30. Again, the Employer acted in breach of his statutory obligations. Firstly, he failed to give the Employee advance notice of his intention to terminate his services as is required under Section C 9 of the Code. Further, the Employer had an obligation to issue a statement notifying the Employee of his temporary termination under section C 42 of the Code. Moreover, since no date of recall was given, the Employer had the statutory obligation to pay severance pay to the Employee upon the expiration of three months after the date of temporary termination. He failed to discharge those obligations.
31. It is instructive to note that when the Employee wrote to the Employer by letter dated February 10, 2010, the Employer took the deliberate decision not to respond to it. His decision was made clear when he testified that at the time of suspension he had no intention of recalling the Employee. In fact, he said that in an earlier telephone conversation he told the Employee that he had been fired.
32. In the premises, this issue must also be resolved in favour of the Employee. There was no temporary termination of employment. Further, in our view, it is significant that the Employer rejected the Employee's invitation to treat the suspension as a temporary termination of his employment.

Whether the Employee was unfairly dismissed

33. The slightest application of the test of reasonableness under Section C 58 (2) of the Code leads to the inevitable conclusion that the dismissal of the Employee was unfair. That conclusion was belatedly conceded by Mr. Rhudd, Counsel for the Employer, towards the end of the trial. Accordingly, it is not necessary to detail the unreasonableness of the Employer's conduct. Upon Mr. Rhudd's concession, we moved on to assess the compensation to which the Employee is entitled.

The Awards of Compensation

Payment in lieu of Notice (Notice pay)

34. Under **Section C 9 (3) of the Code** an employee is entitled to advance notice of his termination at least equivalent to the interval of his paydays. Accordingly, the Employee is entitled to no less than his weekly wages of \$1,500.00 under this head. Having regard to the Employee's tenure of 10 years, I accept his Counsel's submission that his notice pay should be more than the minimum. In our view, he was deserving of no less than two weeks' notice. As a result **we award the sum of \$3,000.00**, being the equivalent of two weeks wages.

Loss of Protection from Unfair Dismissal

35. Based on judicial precedents, an employee who is unfairly dismissed is entitled to compensation, equivalent to severance pay, under this head. Under section C 9 of the Code, a weekly paid employee is entitled to no less than one day's pay for each month worked. Again, given the facts and circumstances of this case, we agree with Mr. Cumberbatch's submission that the Employee should be paid at a higher rate. In our view, he should be paid compensation under this head calculated at the rate of one and a quarter days pay for each month worked. Accordingly, **we award the sum of \$45,000.00** [$(\$300 \times 1.25) \times 10 \times 12$]

Immediate Loss

36. One of the fundamental principles in the law of contracts requires that a victim who suffers loss as a result of the breach of a contract by the other party is entitled to compensation for his loss. The law of unfair dismissal based on statutory provisions is no different. Accordingly, where an Employee suffers loss as a result of being unfairly dismissed he is entitled to compensation for his loss, subject always to his duty to mitigate.
37. In this case, details of the Employee's efforts to mitigate are sketchy at best. That is not surprising, given the nature of the construction industry. The Court must do the best it can using the limited evidence and its own knowledge of the industry in this jurisdiction. It is common knowledge that the earnings of a freelance carpenter may vary considerably from one month to the next. In the circumstances, we fix a time period of six weeks after which the Employee should have found reasonable alternative employment. Accordingly, **we award him the sum of \$9,000.00**, the equivalent of six weeks' full pay in his former employment.
38. The evidence discloses that the Employee sometimes earned between \$150.00 to \$200.00 per day after his dismissal. We fix his average daily pay at \$175.00 leaving a short fall of \$125.00 in his daily wages earned from working for other contractors. In addition, we are also mindful that he earned lump sum payments for whole jobs which he performed as a carpenter/ contractor from time to time. Moreover, we must take into account the exigencies of life and several related imponderables.
39. During the trial the Employee's testified that he worked for three years before being appointed foreman. His evidence in that regard was not challenged. All things being equal, it is likely that it would have taken him approximately the same time before he could have been appointed as Foreman on another construction site. Having said that, we hasten to add that, even in the absence of the position as Foreman, the Employee should have been in a position to earn as much as \$300.00 per day on average no later than 6 months after his dismissal. In the circumstances, we award the weekly sum of (125×5) for a period of twenty six weeks making **a total award of \$16, 250.00** [$(125 \times 5) \times 26$] under this subhead.

Future Loss

40. Consideration is usually given in respect of compensation for future loss when it is anticipated that an employee will not attain his previous level of earnings until sometime in the future.

41. In the present case, an award has been made for the period of time when, in our estimation, the Employee should have been in a position to earn wages at the level he earned before his dismissal . The dismissal was effected towards the end of November 2009 at the latest, over 6 years ago. In the circumstances, there is no basis for an award under this head.

Fringe Benefits

42. The evidence discloses no basis for an award under this head.

Costs

43. We believe that it is important to note what we find to be the Employer's deliberate deception when he issued the warning/ suspension letter knowing that he had no intention of ending the suspension and recalling the Employee. It strikes us that the Employer's real motive was to dismiss the Employee knowing that he had no or no sufficient grounds for lawfully doing so. We conclude that he wanted to get rid of the Employee without providing him with a severance payment package.

44. **Section 10(2) of the Industrial Court Act** provides for the payment of costs only where exceptional reasons exist. In that regard, we are obliged to have regard for the principles and practices of good industrial relations. We embrace our duty to uphold and promote good industrial relations.

45. In the present case, we have identified four exceptional reasons in respect of the Employer's failure or refusal to practice good industrial relations:

(1) Firstly, the Employer's motive at the onset was improper. He clearly intended to terminate the services of the Employee under the guise of a suspension for an indefinite period.

(2) Secondly, during a conversation with the Employee after the suspension was effected, the Employer told him that he had been fired, yet he issued no dismissal letter.

(3) Thirdly, the Employer refused to respond to the Employee when he enquired about his position and signified his willingness to be recalled.

(4) Fourthly, once these proceedings commenced, the Employer could have saved the Court considerable time by making an early admission of liability.

In light of the foregoing exceptional reasons, we award costs in the sum of **\$5,000.00**.

46. We summarize the awards under the respective heads as follows:

(1.) Notice Pay	\$ 3,000.00
(2.) Loss of Protection	45,000.00
(3.) Immediate Loss	25,250.00

(4.) Costs 5,000.00
Total \$ 78,250.00

47. In the premises, we order that the Employer shall pay to the Employee the total sum of \$78,250.00, inclusive of costs, on or before March 30, 2016.

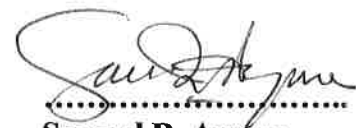
Dated the 10th day of February 2016 :


.....
Charlesworth O. D. Brown
President

I agree.


.....
St. Lawrence De Freitas
Member

I also agree.


.....
Samuel R. Aymer
Member