

ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT

REF. NO. 41 OF 2015

BETWEEN:

GURIE AUGUISTE

Employee

and

S.U.S CONSTRUCTION LTD.

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. John H. R. Benjamin

Member

The Hon. Judith A. Dublin

Member

Appearances:

Mr. Jason Martin, Attorney-at-Law for the Employee

Mr. Norris Scholar, Attorney-at-Law for the Employer

2016: November 11
: November 18

JUDGMENT

Brown, P:

Background Facts

1. The Employer is a construction company registered in Antigua and Barbuda and currently carrying on business at Jumby Bay, Antigua.
2. The Employee commenced her employment in or about September 2000 as a Timekeeper. Her duties included the recording of the time worked by employees and distributing pay packets to them. She was not involved in the computation of the wages and salaries payable to the employees.
3. For the purposes of her duties the Employee kept and maintained a time log book in which she recorded the daily hours of work of each employee including the time they arrived for and the time they left work.



4. Elderfield Smith is the Employer's Senior Manager. His children Lyndon Smith, Morgan "Andy" Sheppard and Jeff Smith are also employed by the Employer as Managers but are subordinate to Elderfield Smith. Lyndon Smith is the Manager responsible for preparing the payroll and pay packets of the Employer's employees based on the Employee's timekeeping records.
5. On August 25, 2009 Senior Manager notified the Employee that he had suspended another employee, Michael Edwards, and instructed her not to record his hours of work in the time log book.
6. Despite his suspension, Michael Edwards continued to work on the Employer's job site. When the Employee noticed him at work, she approached him and told him he should not be on site. As a result of Michael Edwards' response, the Employee spoke to Morgan Sheppard who confirmed that he had authorized Michael Edwards to return to work and that he would speak to the Senior Manager.
7. Based on what Morgan Sheppard said to her the Employee continued to record the times worked by Michael Edwards. The Employee interrupted the sequence of her usual entries in the columns in the time log book with a descriptive entry across the columns as follows:

"Michael Edwards... get into something and your father told me not to put him on the payroll until he say so but Andy saying to let him go work so you can query about it but he came to work for the week (WTF) three days your father take him off book for..."
8. Michael Edwards was paid his wages based on the payroll prepared by Lyndon Smith and delivered by the Employee in accordance with the times recorded by her in the time book.
9. Approximately two (2) weeks after he had instructed the Employee not to record the times for Michael Edwards, the Employer's Senior Manager noticed that he had in fact been paid, as normal, based on the times recorded by the Employee.
10. By letter dated September 14, 2009 signed by the Senior Manager, the Employer dismissed the Employee on the grounds that the Employee had ignored his instruction and paid Michael Edwards. In effect, the Employer contended that the Employee's action amounted to "blatant insubordination" and a breach of trust.

11. At the date of dismissal, the Employee was earning a salary of \$550.00 per week.

The Opposing Cases

12. The Employee commenced this Reference on July 23, 2015. In her Memorandum of Claim filed on July 21, 2015, she pleaded her version of the key facts outlined above. In particular, she denied the allegations of insubordination and breach of trust. She further contended that at all material times she was acting in accordance with normal administrative practices of the Employer. Most importantly, the Employee contended that the matters alleged by the Employer do not warrant summary dismissal.
13. On the other hand, in its Memorandum of Defence filed on September 4, 2015, the Employer disputed the Employee's claim. The Employer contended that after "investigating" the matter it was found that the Employee took it upon herself to record Mr. Edwards's time, thereby disobeying the Employer's lawful instructions and caused him to be paid by the Accounts Department.

The Main Issues

14. The main issues before the Court are:
- (1) Whether the Employee disobeyed the Employer's lawful instructions.
 - (2) If the Employee disobeyed the lawful instructions, whether her disobedience amounted to gross misconduct which entitled the Employer to dismiss her summarily.

The Legal Framework

15. Section C58 of the Antigua & Barbuda Labour Code (the code) provides for "good cause" which would justify a dismissal. That section 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 C 59 (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 (2);**
- (c) is that the employee was made redundant;**
- (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or**

- (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

C 58 (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."

16. The limitations referred to in Section C58 (1) above are set out in C59:

" C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or 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) ...

C59 (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."

17. The Labour Code does not list or define the categories of misconduct which would trigger summary dismissal under Section C59 (1) of the Labour Code. However, at common law, serious/ or gross misconduct includes well recognized categories such as theft, violence, gross negligence and willful refusal to obey a

legitimate order. These categories are grounded on the intentional behaviour of the employee which are such that the summary dismissal by the employer would be justified under section C59 (1) of the Code.

18. In the ordinary course of things, conduct which does not amount to gross misconduct will not justify summary dismissal. In such cases of "ordinary" misconduct a reasonable employer should not dismiss the employee. Instead, he should have proceeded under Section C59 (2) of the Code to give the employee a written warning.
19. 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 that, within the ambit of S C58, of the Labour Code, the burden of proof was on the company to show 'just cause' for dismissing the employees and that since summary dismissal constituted 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 proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content.

...

I am of the view that the Court properly directed itself as to the standard of proof..."

Issue No. 1: Whether the Employee disobeyed the Employer's lawful instruction

20. The Employee's evidence is clear. She admitted that she recorded the times worked by Michael Edwards. The extracts from her time log book confirmed her actions in that regard. However, she maintained that she did so because Mr. Sheppard had authorized Michael Edwards to return to work.
21. The Employer did not deny the Employee's evidence of what Morgan Sheppard said to her. Moreover, the Senior Manager indirectly admitted that the Employer employed some of his children as managers, including Mr. Sheppard, who were subordinate to him.
22. Further, the Employee took the precautionary step of making the entry in her time log book regarding her conversation with Andy Sheppard during which he indirectly authorized her to record the times worked by Michael Edwards. Most

importantly, by her entry in the time log book the Employee requested or suggested to Lyndon Smith that he should make the necessary enquiries about whether or not Michael Edwards should be paid.

23. There is no evidence that Lyndon Smith made any enquiries. Instead, the evidence suggests that he used the times recorded by the Employee to calculate the wages for Michael Edwards which he was paid.
24. Based on the evidence, we find that the Employee had no intention to be dishonest or to mislead the Employer. She did not willfully refuse to obey the instructions given to her by the Senior Manager. Although the better course of action would have been for her to seek clarification from the Senior Manager, we find that the Employee did what she thought was best in a difficult situation then confronting her.
25. In any event, we find that the situation arose as a result of the way in which the Employer conducted its business. It appears that the lines of authority between the Senior Manager and the other Managers were blurred and overlapping. In particular, the evidence disclosed no clear lines of reporting between the Employee the Senior Manager and the other managers.
26. Notwithstanding the foregoing analysis, we are inclined to conclude that the Employee did fail to obey the lawful instruction given to her by the Senior Manager. Accordingly, the first main issue may be resolved in favour of the Employer.
27. However, we hasten to add that the Employee's misconduct did not fall into the category of gross misconduct. At its highest or worst level the Employee actions constitute ordinary misconduct.

Issue No. 2: If the Employee disobeyed the lawful instructions, whether her disobedience amounted to gross misconduct which entitled the Employer to dismiss her summarily

28. Having admitted that it dismissed the Employee, the burden was on the Employer to prove that the dismissal was not unfair.
29. Given the way the company operated and given the duties of the Employee, we conclude that a reasonable employer should have conducted a full and proper investigation in respect of the roles played by Michael Edwards, Andy Sheppard and Lyndon Smith, in their respective capacities in causing Michael Edwards to be paid wages which he might not have been paid otherwise. In that regard, the

Employee should have been confronted with any adverse findings flowing from the investigation.

30. In any event, we are of the firm opinion that the Employee was given no or no proper opportunity to state her case and otherwise be heard in her own defence. In that regard, an explanation from the Employee and/or Lyndon Smith could have made a significant difference when the Employer considered the dismissal of the Employee.
31. If applying the dictum of Berridge J A in the **Dalma Hill** case, as stated above, we are of the opinion that the Employer has failed to discharge its burden of providing cogent, weighty and convincing evidence to prove that summary dismissal was appropriate in the circumstances.
32. For the foregoing reasons we resolve the second issue in favour of the Employee. We are of the firm opinion that, given the prevailing circumstances, the Employer should have proceeded under Section C59 (2) and taken a disciplinary step less severe than dismissal. For completeness, we add that the Employer has failed the test of reasonableness as established under Section C58 (2) of the Labour Code. As a result, we are constrained to conclude that the dismissal was unfair.

Compensation

33. Generally, an employee who was unfairly dismissed is entitled to compensation under several settled heads. In this case, we award compensation as follows:
 - (a) Notice Pay:

The Employee was entitled to receive notice of the termination of her services. Under Section C9 of the Labour Code the notice must be at least equal to the interval of her pay days. Accordingly, **we award the sum of \$550.00** as claimed, being the equivalent of the Employee's weekly salary.
 - (b) Loss of Protection from Unfair Dismissal:

Under Section C56 of the Labour Code, an employee has a right not to be unfairly dismissed. He must be compensated when that right is infringed. The measure of compensation is equivalent to Severance Pay. Under Section C41 of the Labour Code, for weekly paid workers, severance pay is calculated at the rate of one day's pay for each month of employment. The Employee worked for 9 years or 108 months at the rate of \$550.00 per week or \$110.00 per day. Accordingly, **we award the sum of \$11, 880.00 (108 x \$110) under this head.**

(c) Immediate Loss:

An employee who is unfairly dismissed is entitled to compensation for the loss he suffered between the date of dismissal and the date of trial. However, the employee has a duty to mitigate his loss. The Employee testified that after her dismissal in September 2009 she did not find a new job until December 2011. The Employee gave no or no sufficient evidence of her efforts to mitigate her loss. In the circumstances, we are of the view that, with diligent efforts, she should have found alternative employment by the third month after her dismissal. Accordingly, we award her the equivalent 13 weeks pay, in the sum of \$7,150.00 for the first period of her unemployment immediately after her dismissal.

We are of the view that after three months, the Employee should have been able to earn the equivalent of what she now earns in her new job. Her evidence is that she now earns \$1,489.00 per month. This is equivalent to \$343.62 per week, \$206.38 less than her previous salary. In the circumstances we award the sum of \$2,682.94 being the difference of her salary for an additional period of 13 weeks. As a result, **the total award under this head \$9, 832.94.**

34. Given the facts of this case, there are no bases for awards under the heads of future loss, interest and costs.

Order

35. It is ordered that:

- (1) The Employer do pay to the Employee the total sum of \$22,262.94 as compensation for her unfair dismissal.
- (2) The Employer shall pay the said sum of \$22,262.94 to the Employee no later than December 23, 2016.

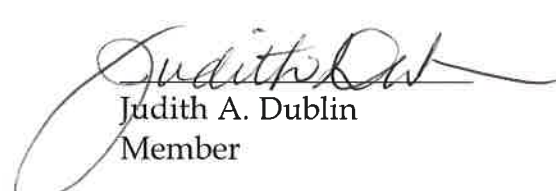
Dated the 18th day of November, 2016



Charlesworth O. D. Brown
President



John H. R. Benjamin
Member



Judith A. Dublin
Member

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