

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 27 OF 2014

BETWEEN:

GLENDORA BURNS

Employee

and

CHASE DISTRIBUTORS LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Hon. Mr. John Benjamin

Member

Hon. Megan Samuel Fields

Member

Appearances:

Mr. Kelvin John, Mr. Loy L.A. Weste and Mrs. Lisa John-Weste of Thomas John & Co.,
Attorneys-at-Law for the Employee

Dr. David Dorsett of Watt, Dorsette & Company, Attorney-at-Law for the Employer

2015: November 10

2016: March 08

JUDGMENT

Brown, P:

Background

1. The Employee commenced her employment with the Employer as Office Manager under a three- year contract dated September 29, 2010. Her duties included the following:
 - “ In conjunction with the Managing Director, plan and direct all phases of operation efficiently, in order to achieve maximum sales and profitability.
 - ...



- **Prepare timely and accurate management report by 15th of the following month.**
 - **...**
 - **Any other management duties that may arise and/or directed by the Managing Director."**
2. Under the contract the Employee was entitled to a monthly salary of \$6,500.00; medical insurance and an annual gratuity equivalent to one month's salary payable at the end of each year during the term of employment.
 3. On May 21, 2012, the Employee received a letter from the Employer's Managing Director which stated as follows:

" ...

I noticed on several occasions you showed up for management meeting and other important decision making discussions with managerial accounting information that were incomplete or incorrect.

This practice in my opinion is unacceptable and will not be tolerated in the future...

Please note that June 30, 2012 will be the dead line to have all outstanding information imputed into QuickBooks as no extension will be granted. You can contact me as many times as possible during this period with any matter of concern regarding this exercise.

..."

4. By letter dated June 09, 2012 the Employee responded to the Employer's letter. She gave explanations for the presentation of incomplete and inaccurate accounting information and stated that the Accounts Department was already engaged in activities that would eradicate or minimize the problems mentioned in the Employer's letter. She asked for the Employer's indulgence, participation and acceptance of her proposals "in order to make things more efficient and effective". The Employee also listed some of her recommendations that needed immediate attention. In the final paragraph in her letter she stated:

"with the knowledge of your acceptance or rejection of these recommendations I will be in a better position to have all outstanding

matters completed. These financial information will be accurate, and delivered daily commencing July 01st 2012 as requested".

5. By letter dated October 31, 2012, with the following opening paragraph, the Employer terminated the contract of employment:

"Following a detailed examination of your work performance over the past few years, it has been decided to terminate your contract with CHASE DISTRIBUTORS LTD effective October 31, 2012..."

6. Having effected the dismissal, the Employer's letter continued:

"The reasons for the above mentioned decision are directly related to the following:

- 1. Your failure to deliver financial information both in a timely basis and free of inaccuracies...**
- 2. Bank Reconciliations for the period January through September 2012 were received in October of 2012...**
- 3. Your failure to effectively supervise your staff ...**
- 4. Your failure to maintain the equilibrium in the Balance Sheet...**
- 5. Your failure to maintain proper records of the company receivables...**
- 6. Staff outstanding balances are inaccurately reported on the Balance sheet ...**
- 7. Outstanding Receivable Account balances are not reconciled.**

Your issues have been brought up at the highest level of Management and the hope has always been expressed that your work performance would have improved and therefore they would be no need for this type of action. However, the difficulty continued and so reluctantly your service has to be terminated."

The Employee's Case

7. The Employee's Witness Statement was admitted as her evidence-in-chief. In sequence corresponding to that used by the Employer, the Employee refuted all the stated reasons for her dismissal as listed in the letter of dismissal.
8. The nub of the Employee's case is that there was no factual basis for the reasons assigned by the Employer for her dismissal. The Employee also contended that the Employer failed to follow the procedure set down in the Antigua and Barbuda Labour Code.
9. Ultimately, the Employee contended that she was unfairly dismissed and claimed compensation for her consequential loss.

The Employer's Case

10. The Employer's sole witness was Desmond Chase, Managing Director of the company. His Witness Statement was also admitted as his evidence-in-chief.
11. The Employer contended that, as one of its "right-hand persons" with managerial responsibility for all office matters, the Employee's work performance was unsatisfactory. As a result, it issued its warning letter indicating that such performance was "unacceptable and would not be tolerated in the future".
12. Moreover, the Employer maintained that the Employee lacked the competence and the ability to perform the tasks required which she was required to perform which led to the termination of her services on the grounds stated in the dismissal letter.

The Main Issues

13. The main issues for determination in this Reference are:

- (a) Whether there was a sufficient factual basis for the Employer's assigned reason for the dismissal.
- (b) Whether the Employee received adequate warning that her employment was at risk.
- (c) Whether the Employer acted reasonably or unreasonably in dismissing the Employee under the circumstances.

The Law

- 14. Section C 56 of the Antigua and Barbuda Labour Code (the Labour Code) establishes the Employee's right not to be unfairly dismissed. Once an employer admits that it dismissed an employee, as in this Reference, the onus is on the employer to prove that the dismissal was not unfair.
- 15. In that regard, the first hurdle facing the Employer is establishing that it had a good cause for the dismissal. Section C 58 (1) of the Labour Code provides for the potentially good causes for dismissal as follows:

"C 58 (1) a dismissal shall not be unfair if the reason assigned by the Employer therefor

- a) ...;
- b) **relates to the capability or qualification of the Employee to perform work of the kind he was employed to do, within the limitations of C59(5);**
- c) ...;
- d) ...
- e) ...;

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

- 16. In relation to incapability or poor performance, an employee may be properly dismissed under Section C 59 (1) of the Labour Code. However, if the employer determines that the allegations against the employee are not serious enough to warrant instant dismissal, he may proceed to issue a warning letter under Section C 59 (5) of the Labour Code, which section provides as follows:

"C 59 (5) Where an employee is not performing his/her 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 said Employee."

17. In the final analysis, the determination as to whether or not a dismissal was unfair turns on the application of the test of reasonableness as provided in Section C58(2) of the Labour Code which reads:

"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."

Issue 1: Whether there was a Sufficient Factual Basis

18. Based on the grounds given by the Employer in its termination letter and its Memorandum, it is clear that the reason assigned by the Employer for the Employee's dismissal, being related to her capability or qualifications to do the work of the kind she was employed to do, falls under Section C58(1)(b) of the Labour Code.
19. The documentary evidence and the oral testimony of both witnesses leave no doubt that there was a serious dispute regarding the facts. At the end of the day, if necessary, this Court will have to determine the facts on the balance of probability. However, in light of the Employee's letter giving her explanations generally and her undertaking in particular, we conclude that there was a factual basis for the assigned reason. We need not at this stage, if at all, make findings of fact and determine whether the factual basis was sufficient to justify the dismissal.

20. In this Reference, based on the evidence and the submissions of Counsel, we are of the view that our consideration of the procedural steps taken by the Employer should take precedence. Accordingly, subject to our resolution of the second main issue, it may or may not be necessary to determine whether there was a sufficient factual basis to justify the dismissal.
21. At this point, we are mindful that if we apply the “subjective test” of reasonableness, as urged by Dr. Dorsett, the Employer need not prove that the Employee was “incompetent”, provided that it honestly held that view on reasonable grounds. We will consider the application of the test of reasonableness when considering the third issue below.
22. On the other hand, we are also mindful of Mr. Weste’s submission that the dismissal was unfair since there was no “factual matrix” on the basis of which this Court should conclude that the Employee’s work performance was unsatisfactory.
23. Given the approach which we have adopted, we will in effect first deal with the second component of Mr. Weste’s submissions, namely, that the Employer failed to follow the procedure and guidelines set down in the Labour Code.

Issue 2: Whether the Warning Letter was adequate

24. This issue requires the application of sections C58 (1) and C59 (5) to the facts. Such an application was done by Rawlins J.A. in the case of **Jewellers Warehouse v. Cecile Nordé, Civil Appeal No. 29 of 2004**. He emphasized that a written warning is mandatory if an employer wishes to terminate the employment of an employee for incapability or poor performance. The learned Justice of Appeal, as he then was, stated as follows:

“When read with section C58 (1)(b) of the Code the requirements of section C59 (5) are mandatory in that where incapability is given as the basis for termination, the requirements of section C59 (5) of the Code must be satisfied if a dismissal for incapability is to be encompassed “within the limitations of section 59 (5)”. The written warning must describe the nature of the incapability that is alleged. It must also state the action the employer intends to take in the event of repetition. The

action for which the employee is dismissed must be a repeat of the matter or matters complained of in the warning letter. ' /

25. The first question in this regard is whether the letter to the Employee dated May 21, 2012 describes the "unsatisfactory performance" as required under the Section. In our view, it appears that the Employer's overall description of the unsatisfactory performance was the Employee's presence at "management meeting and other important decision making discussions with management accounting information that was incomplete or incorrect." It is important to note that the Employer also gave details of the "Minimum Financial Reporting Requirements..." that the Employee was required to meet by the firm deadline of June 30th 2012.
26. In response, by letter dated June 9, 2012, the Employee expressed certain difficulties she was experiencing and made specific recommendations for the Employer's "immediate attention". Specifically, the Employee gave her commitment that the required "financial information will be accurate, and delivered daily commencing July 01, 2012 as requested."
27. Our understanding of the Employee's letter is that she gave a commitment to comply with the Employer's demands regardless of whether or not her recommendations were accepted or rejected.
28. In the circumstances, we conclude that the employer met the first key requirement of section C59 (5) for giving details of the unsatisfactory performance. Moreover, notwithstanding opposing views as to the underlying causes, it appears that there was a meeting of the minds of the Employer and the Employee as to what was required to be done and the time within which it was to be done.
29. The evidence discloses no further communication between the parties after the Employee's letter. As a result, we conclude that the state of affairs, prior to the Employer's letter, continued beyond July 01, 2012 up to October 31 when the Employer terminated the contract. In other words, in the context of section C59 (5), the Employee failed to demonstrate that she was able to perform and had in fact performed her duties in a satisfactory manner within the statutory time limit.

30. We now consider the requirement under section C59 (5) for the Employer to state the action it intended to take "in the event of repetition". In that regard, the Employer's letter stated that the Employee's unsatisfactory performance "will not be tolerated in the future". The questions are: what is the effect of those words? Were they sufficient to bring home to the Employee that her employment was at risk?
31. In the **Jewellers Warehouse case**, the employer's warning letter stated that: "An immediate improvement is expected in order for you to retain your position." In construing those words, the Court of Appeal held that: "This was, in effect, a lay-person's warning that her employment could have been terminated in the event of a repetition of the breach complained of."
32. We are mindful that the Employee's employment was strictly under the fixed term contract. The tolerance or intolerance of the Employer can only be considered in that context. Clause 11 of the contract provided for its termination by the Employer 'for cause'. In the circumstances, we feel obliged to adopt that approach of the Court of Appeal with the result that we consider that the words used by the Employer were sufficient to satisfy the second key requirement of section C59 (5).

Issue 3: Whether the Employer acted reasonably or unreasonably

33. Having met the statutory requirements, the Employer had the statutory right to terminate the contract of employment within the statutory time frame of three months. Obviously, it did not exercise that right. We will now consider the consequences of that failure or omission.
34. In our opinion, as at August 21, 2012 - given the Employer's deadline of June 30, 2012 and the Employee's commitment to meet the Employer's demands by July 01, 2012 - at least two conclusions could have been drawn: Either that the Employee had cured her unsatisfactory performance or that the Employer had waived its statutory right. Whatever conclusion could have been drawn, the fact is that the employment relationship continued for an additional three months up to October 31, 2012.

35. Given the Employee's right not to be unfairly dismissed and Employer's confirmation that it terminated the contract of employment, the burden was on the Employer to prove that it acted reasonably and thereby establish that the termination / dismissal was not unfair.
36. From our perspective, at or before the expiration of the three-month period, the Employer would have put itself in a better position if it issued another warning letter informing the Employee that it had deferred its statutory right and was extending the time and setting a new three month deadline for her compliance.
37. Having said that, we hasten to add that the Employee is not free of blame. Given her contractual duties, her explanation for her unsatisfactory performance and her unconditional undertaking to fully comply with the Employer's demands by July 01, 2012, she would have been in a better position if she wrote a follow-up letter to the Employer explaining the delay and requesting an extension of time. That omission increased her blameworthiness.
38. We note that in its letter of termination the Employer referred to but did not seem to specifically or wholly rely on the warning letter written five months earlier. Instead, it listed seven grounds, only two of which were expressly linked to the warning letter. However, in the penultimate paragraph of the termination letter, the Employer expressed its earlier hope that the Employee's "work performance would have improved and therefore there would be no need for this type of action."
39. By reason of the content of the letter of termination, there is an undeniable link between the warning letter and the termination letter. In other words, the Employer was following up on the warning letter outside of the statutory three month limit given under Section C 59 (5).
40. We have already noted that the Employer did not respond to the Employee's letter of June 9, 2012. Moreover, it did not resolve or otherwise address the issues or recommendations raised and made by the Employee. We consider that omission to be serious and take it into consideration, weighing the same against the Employee's failure to perform and / or follow up her letter of response.
41. We now return to our consideration of the nature of the test of reasonableness as required under section C58 (2) of the Labour Code. In the **Jewellers Warehouse case** the Court of Appeal considered the case of David Lashley & Partners Inc v Bayley (1992) WIR 44 and decided that when determining if an employee is

capable of performing her duties, the correct test of reasonableness under Section C58 (2) is a subjective one. The test was stated in the latter case as follows:

“If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent...In other words, the test... is a subjective one...it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent”.

42. Naturally, judicial precedent dictates the relevant principles which must be applied in a particular situation. In this Reference it is clear that the reason for the dismissal “relates to capability or qualifications” and fell under Section C58 (1) (b) of the Labour Code. This encompasses potentially good causes such as poor performance, incapacity and incompetence. On the facts in this Reference, we are obliged to conclude that the correct test of reasonableness is the subjective one. However, that conclusion does not automatically lead to a finding that the dismissal was not unfair.
43. Like the requirement for reasonableness under section C58 (2) of the Labour Code, the requirement for a written warning and the limitation of three months under section C 59 (5) are grounded in the rules of natural justice. Any breach of the rules on the part of an employer at any stage of the dismissal process has the potential to render a dismissal unfair.
44. Whatever the formulation of the reason for the dismissal , this Court cannot make a finding that good cause existed under section C58 (1) (b) unless it falls “within the limitations of section C59 (5)”.
45. In that regard, at paragraph 20 of the **Jewellers Warehouse** judgment, Rawlins J. A. stated:

“When read with section C58 (1)(b) of the Code the requirements of section C59 (5) are mandatory in that where incapability is given as the basis for termination, the requirements of section C59 (5) of the Code must be satisfied...”

46. At paragraph 21 of the judgment the learned Justice of Appeal continued:

“As far as the time requirement is concerned, section C59(5) permits an employer to terminate the employment of an employee, if during the period of three months after receipt of the written warning the employee does not demonstrate that he or she is able to perform and has performed his or her duties in a satisfactory manner. This, however, does not require the employer to await the expiration of the three months after the warning before issuing a termination letter...”

47. In that case, after receiving a proper warning letter on September 28, 2001, the employee was dismissed, within the three month period, by letter dated November 6, 2001. On the facts, the Court of Appeal found that the employee, Norde, was given “a reasonable time” although the employer did not await the expiration of the three month period delimited in section C59 (5).
48. In our view, it follows logically that if the employer awaits the expiration of the three months after the warning letter before issuing a termination letter it would be acting outside of the limitations of section C59 (5) and thereby nullifying the potentially good cause for dismissal under section C58 (1) (b). In other words, by so doing, the Employer would be acting unreasonably.
49. Clearly, in this Reference, the Employer failed to execute the dismissal under Section C58 (1) (b) within the limitations of section C59 (5). Although a valid warning was issued, the Employer did not terminate the employment of the Employee within the statutory time limit. In fact, the dismissal was effected five months after the warning letter, contrary to the mandatory statutory requirement. In effect, the Employer acted unreasonably.
50. Putting aside the warning letter, which may be considered spent after the expiration of three months, there may be merit in the assertion in the Employee’s Memorandum that her services were summarily terminated. However, having issued the warning letter and relying on it in the dismissal letter, we do not find that the Employer was acting summarily.
51. For the reasons stated above, we conclude that the Employee was unfairly dismissed and is entitled to compensation subject to a reduction thereof because of her contributory fault.

Compensation

52. In the circumstances, subject to the deduction which we will make below, we award compensation based on the Employee's basic salary which was initially fixed at \$6,500.00 in the contract. There is no dispute that at the date of dismissal she was receiving \$7,000.00 per month. We do not find it necessary to determine whether the additional \$500.00 was paid monthly as an increase in salary upon the completion of the probationary period or as an incentive for her timely performance. In any event, we are of the view that it was her contractual right to receive the adjusted salary of \$7,000.00 per month. Accordingly, we assess compensation as follows:

(a) Immediate Loss / the Unexpired Term

The Employee's loss during the unexpired term of 11 months must be assessed subject to her duty to mitigate her loss. We accept her evidence that she made efforts to find alternative employment with several institutions. However, in the absence of any documentary proof of the same, we are left in doubt as the timing and extent of her diligence. It is striking that she commenced her new employment exactly upon the expiration of the original three year term of her contract. In the circumstances, given our knowledge of the job market, we will stagger the Employee's loss in two phases during the unexpired term:

- (i) Phase 1: **We award her the sum of \$42,000.00** being the equivalent of her full monthly salary for the period of 6 months immediately after her dismissal.
- (ii) Phase 2: We are of the view that with diligent and timely efforts the Employee should have been in a position to earn at least one half of the amount she earned under the contract. As a result, **we award her the additional sum of \$17,500.00**, being the equivalent of 50% of her salary for the remaining period of 5 months under the contract.

(b) Gratuity

The Employee is entitled to the equivalent of one month's salary under this head for the last year she was deprived of working under the contract. Accordingly, **we award the sum of \$7,000.00**

(c) Vacation Entitlement

Under the contract the Employee was entitled to 15 days vacation for the last year of service. In the circumstances, **we award the sum of \$4,846.15**, being pay in lieu of vacation for the final contract year.

- (d) Insurance Premium: Insurance coverage was a part of the Employee's contract and she should therefore be compensated for her loss. In her witness statement, she stated the monthly premium was \$175.86. We accept this figure as it was not challenged by the Employer. As a result, **we award the sum of \$1,934.46** for the 11 month period after her dismissal.

53. Having assessed **compensation in the total sum of \$ 73,280.61**, we are obliged to assess the Employee's contributory fault. We note the following:

- **Given the Employee's contractual duties. the Employer relied on her "to ensure that the office operations were going well and properly functioning". To a certain extent, she must share the fault for things not going well without taking any or any sufficient corrective measures.**
- **The Employee's position was reactionary. She stated the difficulties she was facing only after the Employer complained about her unsatisfactory performance and said it would not be tolerated.**
- **In the face of the Employer's warning, the Employee gave her undertaking to meet the Employer's demands by July 1, 2012 but did not do so up to 4 months later.**
- **Apart from her contractual obligations, the Employer's warning letter specifically invited the Employee to contact the Managing Director as many times as possible within the warning period with any matters of concern.**
- **Having written her letter in response, the Employee issued no follow up letter and did not appear to have taken any step to meet the Employer's or her own deadline.**

54. In the circumstances, we assess the Employee's contribution to her dismissal at 40%. As a result, **we reduce the compensation assessed above by that percentage to \$43,968.37**

Short fall on Final Payment.

55. Based on the Employee's claim, we are duty bound to review the quantum of final payment made to the Employee at the time of her dismissal. We review the various items in sequence as follows:

Accrued vacation: The Employee was paid the sum of \$7,500.00 in lieu of outstanding vacation. Based on the adjusted salary, we assess the correct amount to be \$9,692.31, $\{[(\$7,000 \times 12) / 52] / 5\} \times 30$. **We award the shortfall of \$2,192.31**

Notice of termination: The Employer acknowledged the Employee's right to one month's pay in lieu of notice and paid the sum of \$6,500.00. **We award the additional sum of \$500.00.**

Gratuity: The contractual gratuity was one month's salary per year of employment. The Employee was paid \$13,000.00 representing 2 month's salary. **We award the additional sum of \$1,000.00.**

Statutory deductions: We do not accept the hearsay evidence advanced by the Employee at paragraph 26 of her witness statement as the basis for considering whether the statutory deductions should not have been made from her final termination payment. Unfortunately, there is no direct evidence before us and we did not have the benefit of submissions from either Counsel on this point. In the circumstances we refrain from any determination of this issue.

56. We find the **total amount short paid by the Employer in the final payment is in the sum of \$3,692.31.**
57. As to costs, the evidence discloses no exceptional reason to ground an award under this head.

Order

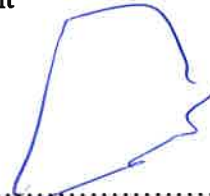
58. In the premises, we order that:

- (1) The Employer shall pay to the Employee:
 - (a) the sum of \$43,968.37 as compensation for her unfair dismissal; and
 - (b) the sum of \$3,692.31 as payment of the shortfall in the Employee's final payment
- (2) The Employer shall pay the total sum of \$47,660.68 to the Employee no later than April 15, 2017

Dated the 08 day of March, 2017



Charlesworth O.D. Brown
President



John Benjamin
Member



Megan Samuel Fields
Member