

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 59 of 2014

BETWEEN:

MICAH DALEY

Employee

and

MITCHELL A. MICHAEL'S 1st CHOICE FOODS T/A FIRST CHOICE
SUPERMARKET

Employer

Before:

The Hon. St. Lawrence de Freitas

Chairman

The Hon. John Benjamin

Member

Appearances:

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

Ms. C. Kamilah Roberts of Roberts and Co. Attorneys-at-Law for the Employer

2016: November 9

2017: November 29

JUDGMENT

1. By Reference dated 9th December 2014 the Employee, Mr. Micah Daley (hereafter referred to as the Employee or Mr. Daley) who lives at Cedar Grove, Antigua has filed a complaint with the Court that he was (1) Constructively Dismissed (2) Unfairly Dismissed by his Employer Mitchell A. Michael's 1st Choice Foods Ltd., t/a. First Choice Supermarket, and that he is entitled to compensation.
2. Mitchell A. Michael's 1st Choice Foods Ltd (hereafter referred to as the Employer or the Company) is a registered Company and operates a Supermarket on the Anchorage Road St. John's Antigua.

Proceedings

3. The Employee's Memorandum was filed on February 2nd 2015. He claims in his Memorandum *inter alia* that the Employer's actions of suspending him indefinitely without pay, amounts to "constructive dismissal" or, in the



alternative the subsequent termination amounts to "double jeopardy" and that in any event the dismissal is unfair. He is asking the Court to award him compensation under the appropriate headings and any other relief that the Court may see fit.

4. The Court notes that "double jeopardy" is not a legal concept in industrial relations law. It is a term which refers to the common law defense in criminal matters that prevents a person from being tried twice for the same crime. The Court accepts, in this context the term to mean "double discipline for the same infraction"
5. The Employer filed their Memorandum on May 22nd 2015. The Employer maintains *inter alia* that the Employee was captured on their surveillance cameras on August 28th 2014 taking a block of rat poison from a table on the loading dock, that the rat poison belonged to the Employer and that the Employee had no authority to remove it from their premises. They further deny that the Employee was unfairly dismissed as alleged or at all, and also deny that the Employee is entitled to compensation under the heads of damages or at all.

The Evidence

6. Mr. Daley started his employment with the Company in May 2013 and continued in that employment until his termination on September 23rd 2014. He had worked for approximately 1 year and 5 months. His evidence is that his last position was that of Warehouse Clerk with a weekly wage of \$10.50 per hour. He was scheduled to work some 5.5 days per week for a 6 day week.
7. His further evidence is that he was also entitled to certain fringe benefits in accordance with an agreement between the Company and the Antigua Trades and Labour Union.
8. The Employee admitted by his witness statement that he had taken possession of the rat poison complained off, but that he believed that it (rat poison) was his, that he had purchased the item from the Employer's supermarket and subsequently lost it. He further admitted on cross examination that "I took up the rat poison and put it in my bag". He further stated that he did not hide and that he believed that the security guard may have seen his overt action.
9. He however, by his witness Statement at paragraph 14 told the Court that, "Based on what the manager told me, I do not hesitate to agree that I was perhaps mistaken about that particular item being the one I lost". On cross examination he was asked "Do you accept that it belonged to the employer? - He answered "yes"

10. The Employee was unable to produce a receipt as evidence that he had purchased the item. He was also unable to give a date he purchased the item, he however asserted that it was, "at a date prior to August 26th, 2014", he could not specifically recall the exact date.
11. The Employer's evidence was given by its Deputy General Manager, Ms. Anya Michael. By her witness statement she told the Court that she received a report from her Security Supervisor, that the Employee was involved in a certain activity as described in their memorandum at Paragraph 4 above. Her evidence is that at the first opportunity, when, the Employee was available she invited the Employee to attend a meeting where the matter was discussed. The meeting was held on Wednesday 3rd. September 2014. Present at the meeting was the Employee's supervisor, Mr. Jace Edwards. The Employee was given an opportunity to explain his version of the incident.
12. The evidence is that at the meeting Ms. Michael told the Employee that he would be suspended without pay until he could provide the Employer with either a receipt of the purchases or a range of dates within which the purchase was made, so that they could "search the system" for the transaction. Her further evidence is that she made it clear to the Employee that he was being suspended pending further investigation of the matter.
13. The Employee's Memorandum refers to the said suspension as indefinite and also purports that the suspension was a form of disciplinary action in respect of the Employee's alleged misconduct. The Employee's representative argued that the subsequent dismissal of the Employee was double discipline for the same infraction. He referred to the condition as that of "double jeopardy".
14. Ms. Michael further told the Court that after the meeting, she conducted a review of the Employee's purchases (using his customer card) for the month of August 2014 but did not find any evidence of the purchase of rat poison. The evidence is that she found that the employee made purchases every day when he was working, but there was no evidence of the purchase of rat poison to substantiate his story. She also gave verbal evidence that she searched by date including a week before the incident. She told the Court that the result of the search was that she could not find any purchases made by the Employee during August 19 through August 26, 2014.
15. She further indicated that the Employee's statement that he believed that the security may have "seen my overt action" is inaccurate, in that, based upon the surveillance footage the security guard's back was to the Employee at the time of the incident.

16. In her further evidence she described the rat poison as being in a package, and stated that the package was opened. On cross examination she said that the package contained several blocks (rat poison) and was valued at about \$20.00.
17. On cross examination Ms. Michael told the court that she believed "he stole the item and is making up a story".

Reason for Dismissal

18. By the letter of termination dated 23 September 2014 the Employee was told, "with regards to your removal of an item belonging to the Company, from the Company's premises, and without having asked any question of any person in authority as to its ownership".
19. The letter then makes reference to the collective agreement between the Company and the Antigua Trades and Labour Union, and the Employee is told that in accordance with schedule 1 of the said agreement "which provides for Summary Dismissal for an employee who takes company property ----- without permission, Please be advised that your employment with 1st Choice Foods has been terminated with immediate effect".

The Law

20. The Antigua labour Code at Section C56 and C58 states:

C56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.

C 58. (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);

(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."

21. C 58 (1) (a) must be read in conjunction with sections C 59 (1), C 59 (2) and C 59 (4). Which read:

C 59. (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;

(b) Committed a criminal offence in the course of employment, without the consent expressed or implied, of the employer; or

(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)-----

(b)-----

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

C59 (4) Where within six months of the receipt of the written warning under subsection (2) the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.

22. The Antigua & Barbuda Labour Code Sec B3 is also applicable and reads in relevant part:

B3 In this division, unless the context otherwise requires

"suspension" means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct;

23. In addition the Industrial Court Act (Cap 214), Sec. 10 (3)b states:

(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) -----

(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.*

Matters to be Determined

24. The Court considers that matters that fall for resolution in this case are:

- (a) Was the Employee Constructively dismissed?
- (b) Did the Employee's dismissal amount to a double punishment for the same alleged misconduct?
- (c) Was the Employee guilty of misconduct so serious that the Employer could not reasonably be expected to take any action other than termination?
- (d) Did the Employer act reasonably in summarily dismissing the employee?
- (e) If the employee was unfairly dismissed, what compensation should be paid to him, if any?

Employer's Submissions

- 25. Learned Counsel for the Employer in their written submissions denies that the Employee was unfairly dismissed and/or that the Employee was constructively dismissed. They submit that, in the first place the Employee was suspended without pay "pending investigation" and was later terminated.
- 26. Counsel for the Employer contends that for an employee to be constructively dismissed "there must be shown conduct on the part of the employer which amounts to a repudiation by the employer of the contract of employment". (**Dantzer West Indies Limited vs Romig Michael [1989] ECSCJ**). They maintain that the employee's submission is unsupported by the facts before the Court and the applicable law.
- 27. Counsel further contends that an Employer is lawfully entitled to suspend an employee without pay pending an investigation into the incident. (**Antigua Barbuda Labour Code -Section B3**). As such, counsel argues that the suspension followed by termination at the end of the investigation cannot be "double jeopardy" (double discipline), and that any such argument should be rejected as being unsupported by the facts before the Court.
- 28. Counsel further brought to the attention of the Court that the Employee's period of suspension did not surpass the four week statutory limitation.

29. Counsel for the Employer referred the Court to the case of **Iceland Frozen Food Ltd v Jones** where the question of reasonableness was discussed and asked the Court to consider the dicta expressed in that matter. She contend that it is not for the Industrial Court to substitute its own discretion for that of the Employer but instead to consider whether the Employer's responses were within the reasonable range of responses.
30. Learned counsel addressed the question of unfair dismissal and submitted that the Employee was captured on surveillance cameras and later he admitted to taking the rat poison belonging to the Employer. That his attempt to justify his action, by relying on a mistaken belief that the rat poison belonged to him, was not supported by the several reasons outlined in their submissions and that the Employer acted reasonably in rejecting the Employee's explanation for his action.

Employee's Submissions

31. Representative for the Employee in written submissions asked the Court to take into consideration **Sections C56, C58 and C59 (1) and (2)** of the Antigua & Barbuda Code, the Employer's Collective Agreement and the principles of good Industrial Relations Practice and he also expressed the believe that the Employer's action represents an "abusive dismissal".
32. The representative also submitted that though the "Employee was aware that, from time to time, the Employer would set out rat poison on or around the loading dock as a part of its rodent eradication programmer", even so, it was the first time that he had seen rat poison ----- left on a table, where staff were required to leave their personal shopping bags, -----."
33. The representative further in his submission, told the court that when the Employee was asked about having taken the rat poison, he admitted to having done so, and that later he "conceded that it was not the one that he had lost".
34. As a part of their submission, the Employee's representative told the Court that "apart from making a statement that a check of the system was done, the Employer presented the Court with no evidence, whatsoever, to support that such a check was, in fact, done". The submission continued "no data or information was shared with, or shown to the Employee".

Analysis of the Facts & the Law

35. Mr. Daley, at the time of his dismissal had worked for his Employer for approximately 1 year and 5 months.

36. The evidence is that the Employer, by their witness, (Ms. Michael), told the Court, *inter alia* that "As part of my further investigation of the matter , I conducted a review of the Employee's purchases using his customer card during the month of August 2014 but did not find any evidence of the purchase of rat poison" she continued to say on cross examination that she searched the system, by date, including a week before the incident but could not find anything during the week of August 19 through August 26.
37. The Employer asked the Court to take into consideration the nature of their business, they maintain that it is extremely important that the misappropriation of company property be dealt with in a serious manner, that it is a considerable source of financial losses for their business, and that it should be viewed as misconduct, for which the Employer cannot reasonably be expected to take any course other than termination.
38. "Proved theft from the employer will usually be a clear ground for dismissal (regardless of the amount taken)". [**Industrial Law, Butterworths, (Second Edition) at page 241**]. The learned authors continued, "The position as it has evolved, approved by the court of appeal in *W. Weddell & Co Ltd v. Tepper* [1980] 1CR 286, [1980] IRLR 96. Is that the employer may dismiss if it has a genuine belief in the employee guilt, which is based on reasonable grounds; ----- the employer certainly does not have to prove guilt beyond reasonable doubt". The learned authors at page 243 opine "The employer must therefore have a genuine belief in the employee's guilt based on such investigation as were reasonable in the circumstances". They continued "it remains clear that theft from the employer himself will be a good ground for dismissal in almost all cases.
39. The Employer's witness when questioned on cross examination stated; "yes, I believe he stole the item and is now making up a story"
40. The Collective agreement between the Company and The Antigua Trades and Labour Union, under the section entitled "Disciplinary Table" at page 20 lists the offence of taking company property, machinery or equipment off company premises without permission (on the first occasion) as punishable by **Summary Dismissal**.
41. In **Jupiter General Insurance Co. Ltd. V Schroff [1937] 3 All E.R. 67** the Court made two observations which are to be borne in mind. The first is that summary dismissal is a strong measure which may be justified only in exceptional circumstances. The second observation is particularly important, namely that the test to be applied in determining whether a summary dismissal is justified would vary depending upon the circumstances of each case. Such circumstances would include the nature of the business and the position held by the employee.

42. The Employee admitted that he had taken the item, (see Paragraph 7 above) but he however maintained that he purchased the item at his Employer's supermarket and believed that it was his. At the meeting held on the 3rd September 2014 he was given an opportunity to discuss the matter, he was invited to produce some or any evidence to show that he had indeed purchased the item, but he was unable to do so. He was subsequently suspended without pay pending further investigation by the employer.
43. The Employer searched their system but were unable to find any record of such, or any sale of rat poison to the Employee. (See Paragraph. 35).
44. Mitchell A. Michael's 1st Choice Foods Ltd is a self-service supermarket where a large variety of foods and other household items are sold. The Employee held the position of warehouse clerk and in this position he would be intimately involved in the movement and stocking of these items. In such position the Employee would be expected to establish and show a very higher standard of loyalty, good faith and trust, and a motivation to protect and safeguard his Employer's property.

Was the Employee Constructively dismissed? And/or did the dismissal amount to double punishment?

45. In the matter before the Court, the employee was suspended without pay, pending the results of an investigation. (See Para 10) and he was terminated at the conclusion of the said investigation and within a reasonable time.
46. The Antigua and Barbuda Labour Code, Cap 27 at Section C3 provides for an employer to suspend an employee without pay *pending investigation* of the Employee's alleged misconduct. (See Paragraph 20 above)
47. The Employer's evidence is that it was made clear to the Employee in the meeting (of 3rd September 2014) that he was being suspended **pending further investigation of the matter**. (See Witness Statement of Anya Michael at Paragraph 23)
48. ----- " in cases of constructive dismissal, an employee had no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract". (**Western Excavating (E.C.C) Ltd. V. Sharp**) [1978] ICR 221, [1978] IRLR 27.
49. We do not find that employer's conduct amounted to a fundamental breach of the employer/employee contract. Consequently there was **no constructive dismissal** nor **did the dismissal amount to double punishment**.

Did the Employer act reasonably in summarily dismissing the employee?

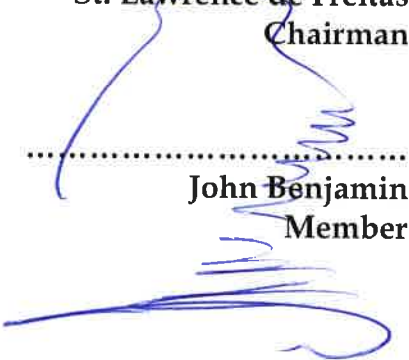
50. By the meeting held on 3rd September 2014, the Employer held consultation with the Employee and gave him an opportunity to be heard and to present any evidence to show that the rat poison was his own and that he had not taken the Employer's property. (See Paragraph 41 above.)
51. The Court accepts the evidence of the Employer that they took steps to search their system to assist the Employee in determining the ownership of the rat poison. (See Paragraph 42 above.)
52. We find that in this matter the Employer acted reasonably, having regard to the principles and practices of good industrial relations.

Decision

53. Careful consideration was given, *inter alia* to the evidence of the parties and the demeanor of the witnesses concerned. Special consideration was given to the relevant sections of the Antigua and Barbuda Labour Code, Cap 27 and the Industrial Court Act, Cap 214 and other authorities.
54. The Employee admitted taking the item complained of, and removing it from the company's premises. We have taken all of the circumstances into consideration and we cannot accept the explanation that the item was his own.
55. We find that the Employer acted fairly when they determined that they could not reasonably be expected to take any course other than termination.
56. We would therefore dismiss the Employee's reference.
57. There shall be no order as to cost.

Dated the ^A29 day of November, 2017


St. Lawrence de Freitas
Chairman


John Benjamin
Member

ANTIGUA & BARBUDA

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JUDGMENT

Hon. St. Lawrence de Freitas, Chairman
Hon. John Benjamin, Member