

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 15 of 2014

BETWEEN:

LLEWELLYN SIMON

Employee

and

CURTAIN BLUFF HOTEL

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Lawrence de Freitas

Member

Appearances:

Mr. Kem Riley of Antigua and Barbuda Workers' Union, Representative for the Employee

Ms. Kari-Anne P. Reynolds of Hill & Hill, Attorneys-at-Law for the Employer

2014: November 6

2018: November 12

JUDGMENT

Brown, P:

Background

1. The Employer provides hotel accommodation and related guest services to its customers at its premises at Old Road Village in the Parish of St. Mary. Its staff includes Security Officers who work on shifts and are deployed at strategic points, including the Main Gate to the premises. Each team of Security Officers on a shift are supervised by a Shift Leader.
2. At all material times, there was in existence a Collective Agreement between the Antigua Hotels and Tourists Association, of which the Employer is a member, and the Antigua and Barbuda Workers' Union. The terms of the Agreement are consistent with the previous one for the period January 1, 2007 to December 31,



2009. The Employee was a member of the Bargaining Unit covered by that Agreement.

3. The Employee was employed by the Employer as a Security Officer from October 19, 1997 until his dismissal on May 24, 2013. The dismissal was effected by letter dated May 24, 2013, excerpts from which are as follows:

“This letter is in regards to the incident that happened on your shift on May 17th 2013, when you neglected your duties as a security officer on the said night of your shift and left your post unmanned and vulnerable for approximately four (4) hours. After interviewing a few officers and along with you on Thursday May 23, 2013 we discovered that you neglected to follow the correct procedures when leaving your post on that night and also put your fellow security officers as well as the guests and property of Curtain Bluff at an extremely high risk especially considering the high crime rate that the island has been experiencing lately.

This letter serves as your letter of termination as per the Antiguan Labour Code, cap 59 section 1 (a).....”

Undisputed Facts

4. Under Appendix 1 to Clause 26 of the governing Collective Agreement, the Disciplinary Code itemizes categories of offences which may be committed by employees and the corresponding disciplinary action agreed to be taken by the Employer. Items 2 and 5 of the Disciplinary Code are as follows:

<u>“APPENDIX 1</u>	DISCIPLINE
1. ...	1 st Occasion- Reprimand
2. Failure to report for work for a complete day without reasonable explanation.	2 nd Occasion- Warning
3. ...	3 rd Occasion- Suspension
4. ...	
5. Failure to perform duties.	4 th Occasion- Dismissal
6. ...	

7...

...

19.

20. Fighting...

Dismissal

...

...
26. Immoral Conduct
27. Stealing..."

Summary Dismissal

5. On May 17, 2013 the Employee worked the 10:30 pm to 6:00 am shift and was posted at the East Beach. At or about midnight he had a conversation with Mr. Bernard Pilgrim, another Security Officer, who was on duty during the shift.
6. During the conversation, it was mutually understood and agreed that the Employee would be absent from his post for an unspecified period of time and that Mr. Pilgrim would temporarily "cover" the Employee's post at the East Beach during his absence.
7. Based on the understanding and agreement between them, Mr. Pilgrim opened the main gate and allowed the Employee to leave the premises sometime between midnight and 12:40 am.
8. In the Employee's absence, Mr. Pilgrim manned the East Beach for a period of time but left that post before the Employee returned sometime later that morning during the shift.

The Dispute

9. In his Memorandum of Claim filed on May 16, 2014, the Employee pleaded as follows:
 - As a result of a telephone call he received during the course of his shift on May 17, 2013 he decided to take his daughter to the hospital. Pursuant to his decision, he requested and obtained permission from the de facto Shift Leader, Mr. Pilgrim, who was stationed at the Main Gate.
 - He left the Employer's premises at or about 12:40 am and returned at approximately 2:30 am. When he returned no one was at or came to the Main Gate so he let himself in and then closed the gate.
 - When he returned to his post and did not find Mr. Pilgrim there, he attempted to contact him by telephone but was not successful. He then continued to perform his duties until the end of his shift.
 - On May 22, 2013 he was required to attend a meeting the following day. At the meeting, attended by Mr. Peter Antifave, the Security Manager, and Ms. Anique Goodwin, the Human Resources Manager, he was told of a report made by Mr. Norris Derrick, another Security Officer, that he was

absent from his post during the said shift. He responded by asserting that he had permission from Mr. Pilgrim to leave the premises.

- By dismissing him on May 24, 2013, the Employer acted in breach of the Disciplinary Code which prescribed the punishment in instances where an employee:
 - (a) Fails to report for work for a complete day without reasonable explanation and
 - (b) Fails to perform his duties
- His dismissal was too harsh and severe a punishment to be meted out to him in the circumstances.

10. By its Memorandum of Defence filed on July 18, 2014 the Employer admitted Mr. Pilgrim agreed to cover the Employee's post for a short time and that it dismissed him by letter dated May 24, 2013. However, the Employer disputes the Employee's claim on the following grounds:

- the Employee
 - left his post more than once during his shift and never obtained permission to leave the second time;
 - failed to follow the correct procedure and policy of the Employer;
 - recklessly put his colleagues and the Employer's guests in serious danger
 - failed to provide evidence of the emergency to the Employer;
 - had a history of leaving his work station
- The dismissal of the Employee was fair as it falls within the provisions of Section C58 of the Labour Code;
- The Employee conducted himself in such a manner as to clearly demonstrate that their employment relationship could not reasonably be expected to continue;
- In the circumstances, it acted reasonably when it dismissed the Employee

The Issues

11. The three main issues for determination are:

- (1) Whether the Employer was bound to follow the Disciplinary Code.
- (2) Whether the conduct of the Employee was serious enough to warrant dismissal?
- (3) Whether the Employer acted reasonably in the circumstances.

The Labour Code

12. For present purposes, it will suffice to state the provisions of section C59 (1) of the Labour Code, being the section on which the Employer relies in its attempt to justify the dismissal.

“C 59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct 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. ...
- c. Behaved immorally in the course of his duties.”

The Evidence

13. Both the Employee's witness statement and his oral testimony are largely consistent with his Memorandum. In particular, he testified that when he sought and obtained Mr. Pilgrim's permission to leave the hotel compound and he returned at approximately 2:30 am. at which time he found no one at the gate so he let himself in, closed the gate but left it unlocked, and went back to his post at the East Beach.
14. Further, the Employee testified that at approximately 4:00 am he left the premises for a second time to assist someone in a stalled vehicle outside the Main Gate; he drove out of the gate which was still unlocked and unmanned; After assisting the person, he drove back onto the premises through the open gate, at which time Mr. Derrick was standing nearby; and that he returned to his post and remained until the end of his shift.
15. The Employee also testified that at the meeting on May 23, 2014 when told of the report against him, he explained that he had an emergency and left the premises with the knowledge and consent of the de facto Shift Leader, Mr. Pilgrim.
16. On the other hand, four (4) witnesses testified on behalf of the Employer. As a whole, the evidence given by them, especially those parts given by Mr. Derrick and Mr. Pilgrim, was riddled with several inconsistencies and contradictions.
17. Firstly, Mr. Derrick testified that he was posted at the Main Gate. This contradicted Mr. Pilgrim who said that he was posted there. According to Mr. Derrick, the Employee was absent from his post from approximately 12:15 am. He reported his absence to the Security Officer at the Front Desk. Although he

made several attempts to contact the Employee, he could not be found on the premises or on the public road just outside. It is noteworthy that Mr. Derrick did not attempt to contact Mr. Pilgrim, who opened the gate to let the Employee off the premises.

18. Further, Mr. Derrick testified that he closed and locked the Main Gate anytime he left his post so that it was not possible for the Employee to enter or exit the premises without his knowledge. Again, this directly contradicted Mr. Pilgrim who said that after letting the Employee out he did not lock the gate. Under cross-examination, when it was put to him, Mr. Derrick accepted that Mr. Pilgrim opened the gate and let the Employee out from the premises.
19. Mr. Derrick also said that he left his post at the main gate at various times and stayed away on average for 15 minutes but would not be away for more than half an hour. This is also inconsistent with Mr. Pilgrim's evidence.
20. As to Mr. Pilgrim, he maintained that as the Security Officer at the Main Gate on the shift, he was the de facto Shift Leader. Mr. Pilgrim also testified that while he faulted the Employee for not calling him during his absence, he found his dismissal "a little harsh". He also stated that if he had "the handle", instead of dismissing the Employee, he would have called him in and spoken to him.
21. As the Employer's Security Manager, Mr. Antifave testified that he received the report from Mr. Derrick regarding the Employee's absence and convened the meeting. Apart from himself, the others present were Ms. Anique Goodwin, the Human Resource Manager and Ms. Carol Anthony, the Security Department Supervisor. Most instructively, Mr. Antifave testified that at the meeting "the Employee was informed that we would continue on investigations and make a decision on disciplinary action based on our findings."
22. Mr. Antifave also stated that later that day, he, along with Ms. Goodwin and Ms. Anthony interviewed Mr. Pilgrim who confirmed the Employee's account of what happened saying that he believed the Employee's absence would be brief so he agreed to cover his post.
23. Based on the evidence before us, the Employer never allowed the Employee to confront Mr. Derrick or any of the other Security Officers. Further, the Employer never informed the Employee of the outcome of its further investigations and any related findings.
24. The fourth witness for the Employer was Ms. Goodwin, the Human Resources Manager. She contradicted Mr. Pilgrim by saying that he was not the Shift Leader. Like Mr. Antifave, she confirmed that at the end of the meeting on May

22, 2013 the Employee was told that the Employer would continue its investigations and then determine the disciplinary action it would take based on its findings."

25. Ms. Goodwin also confirmed that after the meeting the Employer convened another meeting with Mr. Pilgrim. She testified that the Employer considered the information provided by the Employee, Mr. Pilgrim and Mr. Derrick and concluded that "the Employee was in breach of a number of rules and procedures of the Employer." In particular, she said that the Employer concluded that the Employee failed to obtain proper permission to leave his post on more than one occasion; failed to report his return; failed to report security breaches at the main gate. Further, she testified that the Employer also took into consideration the Employee's previous absences from his post.
26. It is clear that the Employer took into account the Employees tardiness in attending the meeting and his failure to apologize. Moreover, the Employer formed the opinion that the categories of offences listed in the Disciplinary Code did not adequately reflect the offences committed by the Employee.

Issue 1: The Disciplinary Code

27. We are mindful that one of the general purposes of the Collective Agreement is "to ensure orderly industrial relations between the Association and its member hotels and their employees and the Union".
28. Further, we are mindful that Section A8 of the Labour Code provides for the establishment of working conditions more advantageous to employees than those minimum standards in the Labour Code itself.
29. The provisions of the Disciplinary Code should not be completely divorced from the provisions of Section C 59 of the Labour Code. Both incorporate the fundamental principles of natural justice, including procedural fairness and reasonableness. To the extent that the provisions of the Disciplinary Code are more advantageous to the Employee, they should be applied in his favour.
30. That general pronouncement should not be interpreted to preclude the right of the Employer to reasonably deal with any infraction, which in its view is not specifically or sufficiently dealt with in the Disciplinary Code. Needless to say, the list of offences should not be considered as being exhaustive. Common sense will dictate that no list of offences can include every conceivable form of misconduct.
31. However, in our opinion, it is only where the categories of offences in the Disciplinary Code do not apply to or are inconsistent with a particular type of

misconduct that the Employer should resort to a direct application of the provisions of the Labour Code.

32. The Employee's position, as submitted by Mr. Riley, is that the conduct of the Employee about which the Employer complained and sought to discipline him is adequately dealt with in the categories of offences under items 2 and/or 4 of the Appendix. Accordingly, the Employee's position is that his dismissal, as the ultimate sanction, should only have been effected on the fourth occurrence of the offence.
33. On the other hand, Ms. Reynolds submitted that the conduct of the Employee was such that it fell outside the band of offences listed in items 2 and 4 of the Disciplinary Code and entitled the Employer to apply Section C 59 (1) directly and reach its conclusion to dismiss him without reference to those items.
34. In the circumstances, the key question is: Was the misconduct of the Employee so serious as to justify the direct application of section C 59 (1) of the Labour Code? Accordingly, we will defer our determination of the first issue pending consideration of the second issue regarding the seriousness of the offences.

Issue 2: The Seriousness of the Offences

35. As to the Employer's reason for dismissal, we are guided largely by the contents of the dismissal letter dated May 24, 2013. That letter clearly limits the Employer's grounds for dismissal to the "incident that happened on your shift on May 17, 2013". The aspects of the misconduct of which the Employee was accused were that he (a) neglected his duties; (b) neglected to follow the correct procedures when leaving his post; and (c) put other security officers, guests and the Employer's property at extremely high risk.
36. When considering the allegations, we applied the fundamental rule: Once an employer admits that it dismissed an employee, the onus is on the employer to lead sufficient cogent evidence at trial to prove that the dismissal was not unfair.
37. In terms of the Labour Code, the required proof falls under section C 58 which requires the establishment of the factual basis for the assigned reason; and, ultimately, the application of the test of reasonableness
38. As to misconduct (a) neglect of duties, it should suffice to note that some aspects of the Employee's evidence were corroborated by Mr. Pilgrim to the effect that that he obtained Mr. Pilgrim's permission. In the circumstances, on a balance of probability, we accept the Employee's account of what happened during the shift. In our opinion, there was no neglect of duties. In any event, there is no

sufficient evidence to establish a neglect of duties so serious as to take the alleged offence outside the scope of the Disciplinary Code.

39. As to the allegation that the Employee left his post “unmanned and vulnerable for approximately four hours”, the same is not substantiated by the evidence. In that regard, we have already noted several areas of conflict and inconsistency in the evidence given by the Employer’s witnesses.
40. As to the allegation of misconduct (b) that the Employee neglected to follow the correct procedures, although Mr. Antifave, the Manager of the Employer’s Security Department, testified, the evidence does not disclose exactly what those procedures were and whether they were ever brought home to the Employee.
41. As to the Employer’s allegation of misconduct (c) that the Employee left his colleagues, the guests and the Employer’s property at “an extremely high risk”, the evidence also left this allegation wholly unsubstantiated.
42. On our assessment of the evidence given on its behalf, we find that the Employer failed to prove that the alleged offences were serious enough to take them outside the ambit of the Disciplinary Code. It is our opinion that there was no justification for the direct application of section C 59 (1) of the Labour Code.
43. In the circumstances, we accept Mr. Riley’s submission, that the dismissal of the Employee was too harsh and severe a punishment for the alleged offences.

Reasonableness

44. The statutory test of reasonableness under section C 58 of the Labour Code embodies the principles and practices of good industrial relations. The application of the test invariably requires consideration of certain fundamental rights including, an employee’s right to know what offences are alleged against him and his right to be heard in his own defence at a fair hearing. In other words, the application of the principles and practices of good industrial relations is a vital component of reasonableness.
45. Taking all the circumstances into account, we considered whether the dismissal of the Employee was a response that would fall within the band of reasonable responses which an Employer should have taken. Towards our conclusion, we considered several aspects of the Employer’s handling of the matter including our findings that:
 - a. The Employer did not conduct a thorough investigation as to what happened during the course of the Employee’s shift which commenced at

10: 00 pm on May 17, 2018. The meeting with the Employee on May 23, 2013 was wholly inadequate.

- b. The Employer carried out further investigations after its meeting with the Employee but never informed him of any adverse findings against him.
 - c. The various allegations made against the Employee in the letter of dismissal were not previously put to him. As a result, he was deprived of the opportunity to respond to them.
 - d. The clear factual inconsistencies revealed in the evidence of its witnesses should have been resolved by the Employer before making its decision to dismiss.
46. In the final analysis, for the reasons stated above, we find Mr. Riley's submissions to be substantially more persuasive than those of Miss Reynolds. The dismissal was harsh and unfair. As a result, the Employee is entitled to compensation which we assess as follows.

Compensation

47. We award compensation to the Employee based on Mr. Riley's closing submissions as follows:

(i) Pay in Lieu of Notice:

Under this head, **we award the sum of \$574.00** being the equivalent of one week's pay.

(ii) Loss of Protection from Unfair Dismissal:

This is the equivalent of the amount which would have been payable to the Employee if he became redundant at the date of his dismissal.

Accordingly, **we award the sum of \$31,974.40** under this head, being the total amount to which he is entitled under the Collective Agreement.

Given his daily wage rate of \$114.80, the following amounts comprise that total: \$5, 510.40 (12 x 114.80 x 4) + \$6,888.00 (15 x 114.80 x4) + \$19,516.00 (20 x 114.80 x 8.5)

(iii) Immediate Loss / Future Loss / Fringe Benefits:

We accept the Employee's evidence that after his dismissal he made no attempts to mitigate his loss. As a result, there is no basis for an award under that these heads.

Contribution

48. On the facts of this case, we reject Counsel's submission that the Employee contributed to his dismissal to the extent that his compensation should be reduced on that basis.

Costs

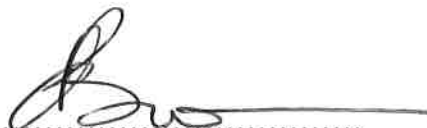
49. We find that exceptional reasons exist to ground an award of costs. These reasons include: the clear breach of the binding provisions of the Disciplinary Code under the Collective Agreement; the blatantly harsh and oppressive nature of the dismissal; and the callous disregard of the principles and practices of good industrial relations. Accordingly, **we award costs in the sum of \$3,500.00.**

Order

50. In the premises, we order that:

- (1) The Employer do pay to the Employee the sum of \$32,548.40 as compensation for his unfair dismissal and the sum of \$3,500.00 as costs
- (2) The total sum of \$36,048.40 shall be paid to the Employee on or before December 15, 2018.

Dated the 12th day of November 2018



Charlesworth O. D. Brown
President



Dr. Hayden Thomas
Member



St. Lawrence de Freitas
Member