

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 26 of 2014

BETWEEN:

DUANE WESTE

Employee

and

ISLAND PROVISION LTD. t/a GOUMET BASKET SUPERMARKET

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Judith Dublin

Member

Appearances:

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

Mr. Justin L. Simon QC, with him Ms. Fiona Murphy of Simon Rogers Murdoch,
Attorneys-at-Law for the Employer

2015: December 1

2018: October 10

JUDGMENT

Brown, P:

Introduction

1. At all material times, the Employer was engaged in business as a wholesaler, distributor and commission agent for various imported and locally produced products marketed in Antigua and Barbuda and other Caribbean islands.
2. The Employee commenced his employment with the Employer on November 4, 1996 and was promoted to the position of Gourmet Basket Supervisor in the



Employer's supermarket with effect from December 27, 2006 at a salary of \$3,400.00 per month.

3. In these proceedings, commenced by Reference filed on May 27, 2014, the Employee contends that he was unfairly dismissed "on or about February 27, 2014" and claims compensation therefor.

Undisputed Facts

4. At all material times the Employer had in place policies, whereby
 - (a) Its supermarket customers had designated accounts whereby they would purchase goods at special discounted "supermarket prices" as opposed to the regular retail prices at which goods were sold to other customers.
 - (b) Its employees had designated staff accounts, whereby each of them was entitled to receive for his own benefit a discount of 6% on the posted sales prices.
5. Pursuant to clause 1 of the Employment Agreement whereby the Employee was employed as Gourmet Basket Supervisor, he was required to perform the several duties detailed in the attached Job Description, including:
 - "...supervision of all Gourmet Basket Staff"
 - "...reconciliation of the cashiers at the end of each shift"
 - "...protection and maintenance of the company's assets"
 - "...carrying out various policies outline by Management"
6. Under clause 2 of the Agreement, the Employee agreed to "perform faithfully, industriously, and to the best of the Employee's ability, experience and talents, all of the duties that may be required by the express and implicit terms of this Agreement, to the reasonable satisfaction of the Employer...".
7. Clause 15 of the Agreement required the Employee to "...submit to all the rules and regulations of the Employer".

The Dispute

8. The Employee's Memorandum of Claim filed on June 24, 2014 alleges the following:
 - (a) On February 27, 2014 he was summoned to a meeting where he was accused of committing several breaches of the Employer's policy on February 23, 2014 by extending special supermarket prices to customers who were not entitled to the same.

- (b) At the meeting he admitted to the allegations stating that he had innocently exercised poor judgment with the sole intention of assisting regular customers.
 - (c) What he did was part of an ongoing practice by “all and sundry” which had been overlooked by management.
 - (d) After the meeting he was sent home without specific instructions and told ‘personally” by the Human Resource Manager to seek “representation”.
 - (e) He was not aware of any course of punitive action that the Employer intended to take.
 - (f) By a general memorandum dated March 4, 2014 the Employer wrote to the other cashiers about the habitual practice of extending Supermarket prices to non-approved customers.
 - (g) The actions of the Employer amounted to summary dismissal on February 27, 2014.
 - (h) By letter dated March 10, 2014 the Employer purported to dismiss him on the grounds that he was “reckless... and exercised poor judgment”
 - (i) The Employer had no sufficient and/or good grounds for summarily dismissing the Employee.
 - (j) Alternatively, the Employer failed to issue a written statement of the precise reason for the dismissal in accordance with Section C10 (1) of the Labour Code.
9. By its Memorandum of Defence filed on September 16, 2014 the Employer disputed the Employee’s claim as follows:
- (a) On February 26, 2014 it was brought to the Employer’s attention that on February 23, 2014 a number of transactions using the account of Mussie’s Mini Mart, a customer who was permitted to purchase goods at discounted supermarket prices.
 - (b) On February 27, 2014 the Employer convened a meeting at which the Employee admitted “without hesitation” that he had used Mussie’s account to provide several other customers with discounts to which they were not entitled.
 - (c) On February 27, 2014, at the same meeting, the Employee also admitted that he used several other accounts of approved customers to give discounts to other customers who had not been approved.
 - (d) At the said meeting the Employee also admitted that he had used his personal employee account, under which he was entitled to a 6% discount, to permit other customers to benefit from the same although they were not so entitled.
 - (e) At some time prior to February 23, 2014, the Employer became aware of discrepancies in its earnings based on the volume of goods sold. That awareness caused the Employer to introduce a new system of tracking

specific accounts. It was that new system which revealed that the Mussie's account had been improperly used on at least 10 occasions on that date to purchase items at a discount.

- (f) In light of the Employee's admissions of the seriousness of the situation, he was advised that he should obtain representation and that the meeting would continue after he did so.
- (g) On March 3, 2014 the Employer was advised that the Employee obtained representation and a meeting was subsequently scheduled for March 5, 2014.
- (h) The Employer carried out further investigations after February 27, 2014 which revealed that the Employee had deprived the Employer of considerable sums totaling over \$150,000.00.
- (i) The Employer denied that it condoned any conduct on the part of the employees of the kind which the Employee had admitted. In any event, other employees who allegedly engaged in such misconduct were all under the supervision of the Employee and required his consent and authorization to grant discounts.
- (m) The Employee was not summarily dismissed. He was dismissed after an investigation and after the Employee was given an opportunity to be heard and represented at a meeting on March 5, 2014.
- (n) The Employee was dismissed with immediate effect by the letter dated March 10, 2014
- (o) The Employee was reckless in his actions, exercised poor judgment, disregarded special customer relationships and breached company policy.
- (p) The Employee held a position of trust and responsibility, was entirely dishonest. He was dismissed for dishonesty and a lack of integrity.
- (q) The Employer accepts its liability to the Employee for (a) his salary for the Period March 1 - 10, 2014, and (b) notice pay

The Issues

10. The main issues arising from the pleadings are:

- (1) Whether the date of dismissal was February 27, or on March 10, 2014?
- (2) Whether the misconduct admitted by the Employee was sufficiently serious to potentially justify his dismissal?
- (3) Whether the Employee was given a fair opportunity to be heard in his own defence?
- (4) Whether the Employer acted reasonably in dismissing the Employee?

The Statutory Framework

11. The right not to be unfairly dismissed is established by section C56 of the Antigua and Barbuda Labour Code. That section provides:

“C 56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer; and no employer shall dismiss any such employee without just cause”.

12. Section C 58 stipulates some just causes which will potentially justify a dismissal, subject always to the statutory test of reasonableness. The misconduct of an employee is a good cause for dismissal. In that regard, section C 58. (1) of the Code provides

“C 58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

- (a) relates to the misconduct of the employee on the job, within the limitations of section C 59 (1) and (2)
- (b) ...

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.

13. The “limitations” of section C 59 (1) and (2) respectively relate to situations, on the one hand, where the misconduct is serious enough to warrant dismissal and situations, on the other hand, where dismissal is not warranted at once, but no repetition of the misconduct would be tolerated. That section provides:

“ 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) ...

”

14. This Court has the statutory power to determine whether or not a dismissal is unfair. In that regard, section 10 (3) of the Industrial Court Act provides:

“10 (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) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
- (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”.

Overview of the Evidence

- 15. Having carefully analyzed the witness statements; listened to the oral testimonies and observed the demeanor of the witnesses; and perused the documentary evidence, we found the evidence of Ms. Correne Samuel, the Employer’s Human Resource Manager to be the most instructive.
- 16. We formed the distinct impression that the Employee struggled to keep his evidence consistent with his Memorandum. In any event, we found him to be generally less credible than the witnesses for the Employer.
- 17. Further, several material aspects of Ms. Samuel’s evidence were corroborated by Mr. Terry Brown, the Employer’s Managing Director. In the final analysis, there was a preponderance of the evidence in favour of the Employer’s case. In resolving the issues below, we will highlight some important parts of the evidence.
- 18. As to the documentary evidence, we note that the letter of dismissal was not as concise as it should have been. However, it included sufficient details to convey the precise reason for the dismissal. That reason was that on February 23, 2014 the Employee misused the account of Mussie’s Mini Mart to grant “supermarket prices” to customers who were not entitled to those special prices.

Issue 1: The date of Dismissal

- 19. The Employee would have us believe that at the end of the meeting on February 27, 2014 the Employer’s Human Resource Manager, Correne Samuel told him “personally as an aside” that he should seek advice on the matter. He came to that conclusion because he considered her to be his “personal friend”.

20. Ms. Samuel's position is that she gave the Employee "instructions" in her "purely" "professional capacity as Human Resource Manager. More particularly, she testified that she told the Employee that the matter was serious and that he should seek representation and return for the continuation of the meeting. She further testified that the Employee was not terminated at that point. In her words, the meeting was "paused" for him to get sufficient representation. She said, "I told him for the meeting to continue he had to be represented."
21. Furthermore, Ms. Samuel's testimony which remained uncontroverted was that the Employee returned to her office on February 28, 2014 and said he was not able to secure representation. She told him that the Employer was not prepared to continue with the meeting unless he was represented. Later that day she received another call from the Employee's representative and eventually a follow-up meeting was arranged for March 05, 2014.
22. On this issue, as to what happened at the end of the meeting on February 27, 2014, we find Ms. Samuel to be more credible than the Employee. In the circumstances, we find that the Employee was not dismissed on February 27, 2014. To the contrary, the meeting on that date was aborted for the specific purpose of allowing the Employee to obtain advice and representation. We accept that upon finding representation, a fresh meeting was convened on March 05, 2014 immediately after which it was communicated to him and his representative that the Employer would get back to them. Eventually, the employee was dismissed on March 10, 2014 by a letter of that date.

Issue 2: The Seriousness of the Misconduct

23. Given the Employer's position, his related duties and responsibilities and his own admission, there is no doubt that he committed acts of serious misconduct. We are mindful of the testimony of the Human Resource Manager, which we accept, that at the time when the meeting was aborted he sat in her office for several minutes. She stated that she "had to encourage him to leave. He held his head. Just from his body language he could barely breathe. I understand from what I observed that he knew the seriousness of the matter".
24. Ms. Samuel testified that "over a period of time the Employer had been recording a significant variance between its theoretical and actual gross margins and was concerned that it could not determine the source of its losses". As a result following its decision in December 2013 the Employer upgraded its system on or about February 17, 2014 in order to better track customers' activities.
25. It appears that the Employee's misconduct was widespread and protracted over and above the ten (10) occasions when the Mussie's account was misused on the

23rd February, 2014. His explanation was that customers had requested discounts which he granted. Moreover, the Employee stated that other accounts of some special customers as well as his own employee account were misused to give discounts to customers who were not so entitled.

26. The effect of the Employee's misconduct was to arbitrarily set aside the Employer's established policy and replace it with a practice based exclusively on his own deliberate discretion.
27. We accept the Employer's position that in coming to its decision to dismiss the Employee, it considered its previous losses, its investigation of the Employee's actions, the Employee's position of responsibility and his own admissions of widespread wrong-doing.
28. It is clear to us that the Employee knew the Employer's policy; the purpose for which it was designed and implemented, and his duty and responsibility as Gourmet Basket Supervisor to fully implement and uphold that policy. The seriousness of the series of offences committed by the Employee is not lessened by the allegations of similar breaches on the part of the cashiers. Further, the memorandum dated March 04, 2014 from Management to the cashiers, whom he supervised, does not mitigate the seriousness of the Employee's misconduct.
29. Naturally, in assessing the seriousness of the Employee's misconduct, we took into consideration the Employee's express contractual obligations, responsibilities and duties noted at paragraphs 5, 6 and 7 above. Most significantly, he had an obligation to perform faithfully and to diligently carry out the Employer's policies. In our opinion, the misconduct was extremely serious in nature and scope.

Issue 3: Procedural Fairness

30. In his closing Submissions, Mr. Carty attacked the Employer's disciplinary procedure contending that the Employee was not apprised of the outcome of the meeting held on February 27, 2014 and was sent away without any instructions as to what would happen next. That submission finds no favour with us. We reiterate paragraphs 19 to 22 above and maintain that the Employee well knew that meeting was aborted and would continue or recommence after he obtained "representation".
31. Further, we are satisfied that on March 5, 2014 the Employee and his representative participated fully in the continuation or recommencement of the meeting which started on February 27, 2014. It is clear that in the presence of his representative, and with the benefit of his advice, the Employee reiterated his

admission of wrong-doing, sought the Employer's forgiveness, stated that his actions were not malicious and that he derived no benefit therefrom.

32. We have taken into consideration provisions of Section C59 of the Labour Code under subsection (1) of which an employer may terminate the employment of an employee who is guilty of misconduct which is sufficiently serious to permit such a course of action. We will return to Section C 59 (1) below. In the meantime, we note that subsection (2) deals with instances where the misconduct is not sufficiently serious to warrant dismissal, but the employer cannot reasonably be expected to tolerate a repetition. Given our earlier conclusion that the Employee's conduct was extremely serious in nature and scope, we are of the opinion that the latter subsection is not applicable and provides no assistance to the Employee.
33. The Employer ensured that Employee was apprised of what was alleged against him as at February 27, 2014; exercised his right to be heard on that date; had the benefit of specialist advice; and exercised his right to be represented and to be fully heard in his own defence on February 5, 2014. In the circumstances, especially in light of the Employee's own admissions of guilt, we find that there was no lack of procedural fairness or any other denial of natural justice.
34. Further, having regard to all the circumstances, we found nothing in the Collective Agreement, if applicable, that would assist the Employee in establishing a breach of the express Disciplinary Code.

Issue 4: The Reasonableness of the Employer's action

35. Fundamentally, we find that the Employee knew and understood fully the Employer's policy of allowing special prices to selected customers and members of staff. He also knew and fully understood his duties and responsibilities under the Employment Agreement by which he was appointed Gourmet Basket Supervisor. The evidence discloses that the Employee himself appreciated the gravity of the situation.
36. As prescribed by Section C58 (2) of the Labour Code, the test of whether or not the Employee's dismissal is unfair is whether the Employer acted reasonably or unreasonably in response to the Employee's misconduct. The requirement of reasonableness is carried over into section C 59 (1) which left it open for the Employer to conclude that the Employee had conducted himself in such a manner as to clearly demonstrate that the employment relationship could not reasonably have been expected to continue.

37. As correctly submitted by Ms. Murphy, it is not our task to determine what the precise reaction the Employer should have been, on the facts of this case. What we have to determine is whether the reaction of the Employer falls within a band of responses which a reasonable employer would have made in the circumstances.

38. It is common ground that the Employee's conduct fell within the category of misconduct which could potentially justify his dismissal, given the position he held. In light of the Employee's admissions of guilt, we have to consider whether the Employer acted reasonably or unreasonably in treating the Employee's misconduct as sufficient for dismissing him. In determining this issue we apply the test, not in a vacuum, but with regard to Section 10 (3) of the Industrial Court Act and "...in accordance with equity, good conscience and the substantial merits of the case..."

39. In approaching the resolution of this issue, we appreciate that within a band of reasonable responses, one employer might decide to dismiss while another might opt for a less severe punishment. In deciding what is reasonable, we have to consider, all the material circumstances at the date of dismissal. Accordingly, we bear in mind that:

- a. the Employee had over 17 years general experience working with the Employer and over seven (7) years as Supermarket Supervisor;
- b. he was required to supervise all the cashiers and other Supermarket Staff to ensure their compliance with the Employer rules and regulations.
- c. not long before the Employee's dismissal the Employer had experienced difficulty in reconciling its gross revenue with the volume of sales.
- d. apart from abusing Mussie's account, the Employee also abused his own personal discount privileges which resulted in real financial loss to the Employer over a period of time.
- e. the Employee repeatedly admitted his guilt; stated that he acted without malice; asked for forgiveness; and expressed his desire to keep his job.

40. In her closing submissions, Ms. Murphy astutely pointed to the Employer's consideration of all the relevant factors. It will suffice to adopt her formulation of the first of those factors as stated at paragraph 50 of those submissions as follows:

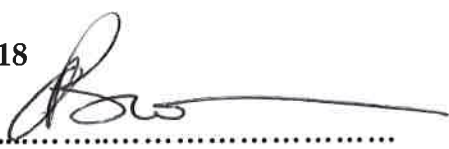
"The first of these factors is that the Employee's actions jeopardized the trust that its customers would have put in it. In misusing not only his own account but also those of a customer, the Employee breached the trust that his Employer had in him and also breached the trust the Employer's customer had in it..."

41. It is well settled that in every contract of employment there is an implied term for mutual honesty, trust and confidence. The breach of that implied term by either party goes to the heart of the agreement and entitles the other party to terminate the employer/employee relationship. That implied term is substantially stated as an express term under clause 2 of the Employment Agreement by which the Employee agreed to perform his duties faithfully and industriously.
42. Further, Counsel emphasized the costs of the Employee's conduct and the nature of his position vis-à-vis management on the one hand and cashiers and floor staff on the other hand.
43. In the final analysis, upon application of the test of reasonableness, we are fully persuaded by Ms. Murphy's ultimate closing submission that the Employer's decision to dismiss the Employee was squarely within the band of reasonable responses that an employer would make in the circumstances. Accordingly we conclude, that under the circumstances, notwithstanding the Employee's admission and apology, the Employer acted reasonably when it dismissed him.

Conclusion

44. In the premises, we declare that the dismissal was not unfair. As a result, the Reference is dismissed with no order as to costs.
45. Finally, we note the Employer's admission in its Memorandum that the Employee is entitled to (a) his salary for the period 1st to 10th March 2014, and (b) payment in lieu of notice of his dismissal. Accordingly, we reckon that the sums of \$1,120.90 and \$3,400.00 respectively are due to the Employee under those heads. The total sum of \$4,520.90 should be paid to the Employee as soon as practicable.

Dated the 10th day of October, 2018


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Charlesworth O.D. Brown
President


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Dr. Hayden Thomas
Member


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Judith Dublin
Member

