

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 69 OF 2015

BETWEEN

EISSA NASSAR

Employee

and

THE GAZEBO LIMITED

Employer

Before:

The Hon. Dr. Hayden Thomas

The Hon. John Benjamin

The Hon. Samuel Aymer

Chairman

Member

Member

Appearances:

Mr Samuel A. James of Antigua and Barbuda Free Trade Union, Representative for the Employee

Ms. Victoria Godier of The Gazebo Limited, the Employer

2017: June 14
2018: September 19

JUDGMENT

THOMAS, C.

BACKGROUND

- (1) The Gazebo Ltd. is a business operating at Friar's Hill Road, St. John's, Antigua and is concerned among other things with the sale of clay pots. Its sole owner is Victoria Godier. According to the Employee, he was employed at the Gazebo from October, 2005 to April 2, 2012 as a Driver/Porter when his employment was terminated.



- (2) The Employee, through his Union Representative, filed a complaint dated 12th December 2015 with the Industrial Court claiming Unfair Dismissal.

The Employee's Case

- (3) The Employee filed a Memorandum dated December 21, 2015 with the Court. It stated the following *inter alia*:
- (a) A request by the Employee of the Employer for a "written Statement of Working conditions, was never honoured by the Employer."
 - (b) On or about November 2010, the Employer placed the remains of three broken clay pots at its refuse dump located at the back of the work place.
 - (c) On or about May, 2011 the garbage truck removed two of the damaged clay pots and left one. The Employee subsequently approached the Store Manager Ms. Selena Alam and asked if he could have the remaining broken clay pot for his personal use. He claimed that Ms. Alam granted him permission to take the pot and that at the time the Employer Ms. Victoria Godier was overseas. The Employee also stated that he had informed a co-worker Mr. George Yousef of the permission which he had obtained.
 - (d) On or about Saturday 31st March, 2012, Ms. Godier enquired from Mr. Nassar about the damaged clay pot and he reported that Ms Alam, during Ms. Godier's absence, had granted him permission to take it. He also said he was aware that Ms. Alam had informed her about this. Ms. Godier, however, denied that she was so informed by Ms. Alam.
 - (e) In an effort to avoid the matter becoming contentious and also to avoid damaging the good relationship which he had with the Employer, the Employee offered to pay for the pot. He said that the Employer promised to inform him of the cost by the following Monday.
 - (f) The Employee mentioned that he reported for work as usual on the following Monday (2nd April, 2012) and that after he had already commenced his duties, instead of informing him of the cost of the clay pot, Mrs. Godier gave him a letter of termination dated 2nd April 2012. In the letter, the Employee was accused of removing "an item of stock belonging to the Gazebo Ltd." without the Employer's knowledge or permission. The item was valued at four hundred and twenty two dollars and thirty cents (\$422.30).

- (g) The Employee said that the Employer in its letter of termination failed to provide the description of the item belonging to the Gazebo Ltd. which he was accused of removing without permission. The Employee also noted that whereas "the Employee offered to pay the Employer for the damaged clay pot, and whereby the Employer advised the Employee that the Employer will let the Employee know the cost of the damaged clay pot by the following Monday, the Employer failed to furnish the Employee in writing any concerns it had regarding the Employee's stewardship or what the Employer was contemplating." He further stated "that the Employer, prior to and leading up to Monday 2nd April, 2012, failed to afford the Employee 'due process' regarding this matter, despite the fact that the Employee informed the Employer that Ms. Alam, the Store Manager, granted the Employee permission to take the last remaining broken clay pot, that was at the work place refuse dump for the Employee's personal use."
- (h) Additionally, the Employee asserts that there was no legal basis for the termination of his employment by the Employer, and that he was unfairly dismissed, and ought to be compensated for *Payment in lieu of notice, Outstanding vacation Pay, Loss of Protection, Unfair Dismissal and Damages*.

The Employer's Case

- (4) The Employer submitted its Memorandum to the Court on January 29, 2016. It stated the following *inter alia*:
- (a) The Employee was employed by the Employer as a driver/porter from 26th January, 2007 to 2nd April, 2012 and he never requested a formal statement of working conditions.
- (b) The Gazebo received a shipment of clay pots in a container on or about November, 2010. After unloading, the remains of four damaged clay pots were placed at the back of the building, inside the fence – not in the refuse dump. The garbage truck comes at least once a month after each container is unloaded.
- (c) After the condition of the four damaged pots was checked, two were deemed too damaged to be repaired for the annual sale on 1st October. They were therefore placed in the refuse area and removed from the computer inventory. The two remaining items were large pots described as "BBQ" and "Kingkong". BBQ needed repairs after which it would be placed in the annual sale.

- (d) The Employee asked the Employer what it wanted to do with "BBQ" and the Employer requested that it be placed in the freezer room which had a padlock. At the time there was no more space in the warehouse. The Employer said it would keep Kingkong as a replacement pot for one that was outside with flowers planted. The Kingkong pot remained outside for some three years without anyone removing it.
- (e) Mrs. Godier agreed that she was overseas, but that Mrs. Alam was in contact with her by email and would have asked first since she knew that "no decisions of this sort are her prerogative to make". Further, an item of this value (\$422.30) would not be given as a gift to the most junior staff member.
- (f) The Employer stated in summary that (i) the item was never in the refuse dump, (ii) the item was not the last remaining damaged pot at the back of the building, (iii) the other pot remained in the same position for three years, (iv) the item was not removed from the inventory list, because the damage did not require it to be removed but instead sold at a 35% discount, (v) there was little time between closing time at 1.00 p.m. on Saturday 31st March, 2012 and Monday morning 2nd April, 2012 for dealing with the matter. The Employer felt it could no longer trust the Employee to be in the warehouse or shop hence the reason for dismissing him.

The Main Issues

- (5) We consider the following to be the main issues in this case:
 - (a) Was the damaged clay pot removed by the Employee from the Employer's business with or without its authority?
 - (b) Was summary dismissal justified in the circumstances?
 - (c) If the Employee was unfairly dismissed, what is the level of compensation to which he is entitled?

Legal Framework

- (6) The statutory right of an employee not to be unfairly dismissed is embodied In Section C 56 of the Antigua and Barbuda Labour Code (hereinafter referred to as "The Labour Code"). It states:

“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”.

(7) Section C 58 (1) states:

“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”.

(8) C 58(2) states:

“The test, generally, for deciding whether or not a dismissal is 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”.

(9) C 59(1) states:

“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 his employment, without the consent, express or implied of the employer.....”

(10) Section C59 (2) states:

(2) “Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of

(a) a repetition of the misconduct; or

(b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.”

Sub-sections C 59 (3), (4) and (5) go on to give details of procedures that should be followed by the employer in the event there are further infractions by the employee.

The First Issue

Did the Employee remove the damaged clay pot from the Employer’s business with or without its authority?

(11) The Employee did not deny removing the damaged clay pot from the premises although his explanation of what took place differed significantly from that given by the Employer as outlined in its Witness Statements. The following are repeated for emphasis:

(i) According to the Employee, three broken clay pots which came in a container were placed by the Employer in its refuse dump located at the back of the work place. The Employer stated, however, that there were four damaged pots - not three - which were placed behind the Gazebo building and not the refuse dump. Following further inspection by the Employer, two of the pots were regarded as being too damaged to resell in their annual sale and were then placed in the refuse dump. Two pots were left behind the Gazebo building.

(ii) The Employee said that while the Employer was overseas he obtained permission from Mrs. Selena Alam, the Store Manager, to take the remaining

broken pot. The Employer, on the other hand, said that Mrs. Alam did not give permission and that in any event she did not have the authority to do so.

(iii) Mr. Nassar stated that Mrs. Alam had informed Mrs. Godier of the removal of the pot while Mrs. Godier denied having been so informed.

(iv) Mr. George Yousef, the Supervisor, said that it was confirmed by Nassar that he had taken the pot with Mrs. Alam's permission, but Mrs. Alam said that it was not true.

(12) The ideal situation would have been for Mrs. Alam to appear in Court to give evidence to confirm whether or not she gave the Employee permission to remove the clay pot from the work site. Unfortunately, this did not happen. Instead, there was a last minute attempt by the Employee's representative only on the morning of the trial to seek admission of a letter on the subject from Mrs. Alam. The Court ruled this out of order as this would not have given all parties involved a fair opportunity to deal with the matter.

(13) It is convenient to reiterate here the sequence of events as provided by sworn testimony:

1. In 2011, the Employee received permission from Mrs. Alam to take the damaged BBQ clay pot.
2. The Employer gave evidence that Mr. George Yousef, her Supervisor, confirmed with Mrs. Alam that she did not give permission to the Employee to remove the pot in question. The Employer produced into evidence a letter from George Yousef to that effect.
3. The Employer also gave evidence that George Yousef only told her on 31st March, 2012 about this situation which he knew about since May, 2011. This report was given by him after she made enquiries about the pot.
4. The Employer said that she had been overseas and returned to work sometime in May or June, 2011 at which time Mrs. Alam was overseas. Yousef was then the next senior staff member to her and took around ten months to report that he had information from Ms. Alam that she did not give the Employee permission to take the clay pot.

5. The Employer gave evidence that she did not discuss with Selena what the Employee said, even though she had Selena's contact information including email address. Indeed no proper investigation was conducted to confirm or otherwise the accusation that the Employee had taken the Employer's property without permission.

- (14) Taking everything into consideration, in our opinion, the Employer did not prove on a balance of probability that the pot was removed by the Employee without permission. What, however, is not in doubt is the fact that the pot was removed by the Employee from the work site. The effect of this on the final outcome of the case will be determined in due course.

The Second Issue

Was summary dismissal justified in the circumstances?

- (15) The termination letter dated 2nd April, 2012 written by the Employer to the Employee states:

“ NOTICE TO MR EISSA NASAR

It has come to my attention during annual stocktaking on Saturday 31st March 2012, that an item of stock belonging to the Gazebo Ltd valued at \$649.70 which would have been sold for 35% off, due to damage at \$422.30 has been removed from the premises by you without my knowledge or permission.

Due to the serious nature of this action it will no longer be possible for you to remain employed at the Gazebo.

(Sgd.) V. Godier

Owner of the Gazebo”

- (16) To assist us in arriving at a decision, we considered it useful to refer here to comments made by authorities on the subject of dismissal/summary dismissal. Some of these were cited by the Employee's representative in his written submission in support of his case and we consider them to be relevant. The following will suffice:

- (17) Industrial Court of Antigua and Barbuda Ref. No. 4 of 2004, Jennifer Geran vs. Dream Co. Ltd.(K-Club Barbuda). Para 19 states:

“Summary Dismissal is a strong and severe measure that can be justified only in the most exceptional circumstances.... Further, there should be an investigation and consultation before termination thereby allowing the employee to be heard.”

- (18) In the Industrial Court of Antigua and Barbuda, Ref. No. 14 of 2007, Clarence Crawford vs. Halcyon Cove by Rex Resorts, in his judgment Pilgrim, P. in Para. 42, quoted Maundy P., thus:

“As a general rule Dismissal/Summary Dismissal should not be ordered for a first offence unless it falls within one of the exceptions, viz. gross misconduct, where the Employee was caught in the act of committing a serious breach of duty or had committed a serious criminal offence. Further, there should be an investigation and consultation before the termination, thereby allowing the Employee to be heard.”

- (19) Lucy Morris (March 11, 2014) in Personnel Today Essential HR News and Guidance from the Xpert HR Team states “Dismissal may not always be found to be a reasonable and fair decision, even where there is a finding of gross misconduct.....An employee’s misconduct is potentially fair reason for dismissal, but if an employer has concluded that misconduct has occurred, it then has to consider whether or not dismissal for that misconduct is a reasonable sanction”.

Some of the circumstances for consideration may include

- the employee’s explanation of the conduct
- mitigating circumstances advanced by the employee
- length of service
- previous disciplinary record
- the employee’s usual conduct
- consistency of treatment between employees.

- (20) The evidence given by Mrs. Godier clearly shows that proper attention was not given to detail in respect of the investigative process to ensure that the allegation was sustained. For example, (a) she did not have a disciplinary hearing to establish the Employee’s guilt re his removal of the clay pot without permission;(b) he was not notified of any upcoming pending disciplinary proceedings; (c) No criminal charge was laid although theft was implied; (d) Mr. Nassar was given the impression that on return to work on April 2, 2012, he would have been told of the cost of the pot. Instead he was, to his surprise, handed a termination letter indicating that he was guilty of gross misconduct. (e) A proper investigation would

have included the participation of Ms. Godier, Ms. Alam, Mr. Yousef and Mr. Nassar.

- (21) It is evident that Ms. Godier on April 2, 2012 went with her mind fully made up to dismiss Mr. Nassar summarily without even considering lesser sanctions such as warning or even suspension. As indicated earlier in paragraph [18], "Summary Dismissal is a strong and severe measure that can be justified only in the most exceptional circumstances". We submit that in our opinion compelling arguments with respect to most exceptional circumstances have not been provided by the Employer.
- (22) Taking everything into consideration, we are of the view that summary dismissal was not justified in the circumstances i.e. that the Employee was unfairly dismissed.

The Third Issue

If the Employee was unfairly dismissed, what is the level of compensation to which he is entitled?

- (23) Well established procedures have been laid down in this Court with respect to compensation of Employees by Employers for unfair dismissals. Compensation includes, where appropriate, **Payment in lieu of notice, Outstanding Vacation Pay, Loss of protection – the equivalent Severance Pay, Immediate Loss, Future Loss and Exemplary Damages.** Amounts due under the various Heads will now be considered.

(a) Notice Pay

The Employee is due one week's pay in lieu of notice. He is therefore awarded the sum of \$673.73 under this head.

(b) Vacation Pay

No vacation pay was said to be outstanding, therefore, no amount was awarded under this Head.

(c) Loss of Job Protection

This is the equivalent of Severance Pay which, according to Section C 41 of the Labour Code, is calculated on the basis of "at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of his employment with his employer.....".

The Employee's evidence was that he commenced working at the Gazebo in October, 2006 while the Employer stated that it was 26th January, 2007. Perusal of a completed Social Security Form, however, showed an earlier payment for week ending 5th January, 2007. During trial, Mrs. Godier testified that the Employee had started working a bit earlier but did not give a specific date. In its absence, we feel it reasonable to use an intermediate starting date of 1st November, 2006 with the ending date of 2nd April, 2012. This gives a total work period of 65 months. His weekly wages was \$673.73 for a week of 5.5 days i.e. \$122.49 per day. Total award under this Head is therefore $\$122.49 \times 65 = \$7,961.95$

(d) Immediate Loss

It is our understanding that the Employee obtained another job about 5 weeks after he was dismissed. We therefore award the sum of \$3,368.65 being the equivalent of 5 weeks wages (\$673.73 x5) for the period immediately after his dismissal. In addition, we also award the sum of \$5,369.52 being the difference between his old and new wages for a an additional period of 24 weeks (\$223.73 x 24). The total award under this head is **\$8,738.17**.

(e) Future loss

We made no award under this head.

(f) Exemplary Damages

We find no ground for an award under this head.

Summary of the Awards

Notice Pay	\$ 673.73
Loss of Job Protection	7,961.95
Immediate Loss	8,738.17
TOTAL	\$17,373.85

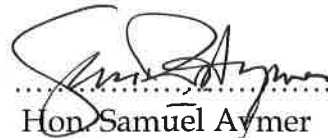
(24) Order

The Employer shall pay to the Employee the total amount of \$17,373.85 in settlement of his claim for unfair dismissal. This amount is to be paid to the Employee not later than October 15, 2018.

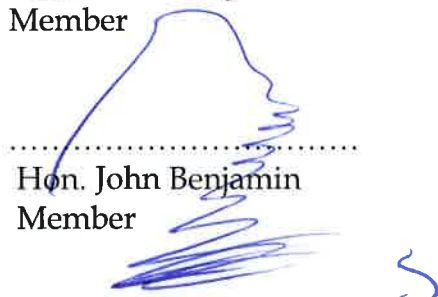
Dated the ¹⁴9 day of September, 2018.



Hon. Dr. Hayden Thomas
Chairman



Hon. Samuel Aymer
Member



Hon. John Benjamin
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 69 OF 2015

BETWEEN:

EISSA NASSAR

Employee

And

THE GAZEBO LIMITED

Employer

JUDGMENT

Hon. Dr. Hayden Thomas, Chairman
Hon. John Benjamin, Member
Hon. Samuel Aymer, Member