



ADVANCE COPY PENDING SIGNATURE OF MEMBER

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 28 OF 2014

BETWEEN

HAROLD SAMUEL

Employee

and

AMERICAN UNIVERSITY OF ANTIGUA INC

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Megan Samuel-Fields

Member

The Hon. Samuel Aymer

Member

Appearances:

Ms. Cicely Charles of Antigua Hotel Management Association, Representative for the Employee

Mrs. Andrea Roberts-Nicholas of Roberts & Co., Attorney-at-Law for the Employer

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2016: November 9

2019: May 31

JUDGMENT

Brown, P;

Background

1. By his Reference commencing these proceedings, the Employee identified "unfair dismissal" the main issue between the parties. By his Memorandum of Claim filed on 30th July, 2014 he averred that the termination of his employment was "unfair and cruel."
2. The Employee commenced his employment as a Plumber/Carpenter in the Employer's Maintenance Department situate at Jabberwock Road, Antigua on



01st July, 2009. His last salary was \$3,786.00 per month. In accordance with the terms of his letter of employment, he was required to report to Mr. Basil Stuart, the Employer's Director of Administrative Services and Mr. Liston Murraine, the Facilities Supervisor. Three years later, by letter dated 12th October, 2012 the Employer confirmed the Employee's "usual duties in plumbing and carpentry, and any other related duties which may be assigned by Management."

3. On 09th July, 2013, Mr. Stuart instructed the Employee to carry out some remedial plumbing works on the Employer's premises. The Employee failed to comply as instructed. When Mr. Stuart questioned the Employee about the matter, differences arose between them.
4. On 10th July, 2013 a meeting was convened by the Employer to enquire into the unresolved differences. Those in attendance included the Union's Shop Steward, Lisa Yearwood, Martin LaBarrie and Mr. Paul Thomas who were then the Employer's Director of Administrative Services and Facilities Supervisor respectively. During the meeting an altercation developed between the Employee and Mr. Stuart.
5. By letter dated July 10, 2013 the employee was suspended for 3 work days on the grounds of (a) his failure to carry out the specific instructions of Mr. Stuart (who was then the Employer's Vice-President of Administrative Services) and (b) insulting Mr. Stuart and displaying threatening behavior towards him. By that letter the Employee was required to report to the office of the Human Resources Manager on July 15, 2013
6. On July 15, 2013 the Employer delivered a letter to the Employee summarily dismissing him for "gross misconduct" in the course of his employment. By that letter, the Employee was also informed that a report had been made to the police concerning his threats to Mr. Stuart.

The Legal Framework

7. It is clear that in accordance with section C 58 (1) of the Antigua and Barbuda Labour Code, the Employer relies on misconduct as good cause for the Employee's dismissal. The proviso in that section is that there must be a factual basis for that assigned reason. Section C 58 (1) provides:

"C58 (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) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59 (2);*
- (c) is that the employee was made redundant;*
- (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or*
- (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held;*

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

8. Section C59 (1) allows for the summary dismissal of an employee who is guilty of serious misconduct such that the employer could not reasonably be expected to continue the employment relationship. Section C 59 (1) 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) committed a criminal offence in the course of employment, without the consent, express or implied, of the employer; or*
- (c) behaved immorally in the course of his duties."*

9. An employer's action in dismissing an employee is subject always to the test of reasonableness under section C 58 (2) of the Labour Code. The question is whether the employer acted reasonably or unreasonably in dismissing the employee for the assigned reason under the circumstances which prevailed at the material time. Section C 58 (2) 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."

10. Summary dismissal is a strong measure requiring strict, persuasive and convincing evidence which must be cogent and weighty in nature and content. Where an employer has dismissed an employee, the burden is on the employer to prove on a balance of probabilities, that the dismissal was not unfair.
11. In instances where a dismissal is held to be unfair by reason of the employer's failure to follow the correct procedure, the Court will consider to what extent, if any, the Employee contributed to his dismissal. In such situations a compensatory award to the employee may be reduced to take into account his contributory fault.

Findings of Fact

12. We have carefully noted and considered the personal testimonies of the Employee and the Employer's 2 witnesses, Mr. LaBarrie and Mr. Thomas. It is noteworthy that although they were listed as witnesses, Mr. Stuart and Ms. Yearwood were not called to testify. In our estimation, Mr. Stuart would have been a crucial witness.
13. On a balance of probabilities, taking all the oral and documentary evidence as well as the closing submissions of Counsel and the Union Representative into account, our findings of fact include the following:

At the meeting on July 10, 2013 the Employee-

- (a) insulted Mr. Stuart by calling him a "jackass" in the presence of other members of the management team and the Shop Steward.
 - (b) used threatening language to Mr. Stuart and displayed aggressive physical behavior towards him.
14. In addition, we also find that:
- (c) It was not uncommon for the Employee to receive conflicting instructions from members of management
 - (d) Prior to receiving instructions from Mr. Stuart on July 9, 2013, the Employee had received conflicting instructions from Mr. Thomas.

- (e) In relation to the instructions given by Mr. Stuart, the Employee explained to Mr. Thomas the difficulties he was having regarding the availability of some power tools.
- (f) The Employee was a competent worker to whom Mr. Thomas extended a certain amount of trust.
- (g) Prior to calling him a “jackass”, Mr. Stuart had insulted the Employee by referring to him as “an idiot” during the said meeting.
- (h) The Employee deliberately refused to answer the question put to him by Mr. Stuart.
- (i) Both the Employee and Mr. Stuart became angry towards each other during the meeting. They raised their voices and became agitated during the exchanges between them.

15. It is noteworthy that the reasons assigned by the Employer for the dismissal, being largely related to items (g), (h) and (i) of paragraph 14 above, were limited to the events at the meeting on July 10, 2013. The dismissal letter did not accuse the Employee of insubordination or any other form of misconduct prior to the meeting.

Resolving the Main Issue

16. The main issue as to whether the Employee was unfairly dismissed must be resolved in accordance with the provisions of the Labour Code and the evidence before us. To that end, the first question to be answered is whether there was a good factual basis for the Employer’s conclusion that he was guilty of misconduct. Secondly, we have to consider whether the Employer presented sufficient evidence with the requisite cogency and weight. Thirdly we also have to consider whether the Employer acted reasonably in dismissing the Employee for the assigned reason of misconduct in the circumstances.
17. Having regard to our findings of fact above, we are of the view that the situation was far more complex than suggested by the Employer. There existed fundamental issues regarding the chain of command moving upwards from the Employee. For example, was it reasonable for Mr. Stuart to countermand the earlier instructions given to the Employee by Mr. Thomas?
18. In that regard, we recall the requirement in the Employee’s contract that he report to both Mr. Basil Stuart, who was then the Employer’s Director of Administrative Services and Mr. Liston Murraine, who was then the Facilities Supervisor. The evidence discloses that by May 9, 2010, due to an apparent reorganization or restructuring, the Employee was required to report to Mr Martin LaBarrie who had taken over Mr Stuart’s earlier position of Director of Administrative Services as well as Mr. Stuart, who then held position of Vice

President of Administration and Mr Paul Thomas, the Maintenance Manager. It is not clear whether the Employee was still required to report to the Facilities Supervisor, the position previously held by Mr. Murraine. It is also interesting to note that by the letter dated October 12, 2012 the Employee was required to perform duties assigned to him by "Management". To say the least, it appears to us that at the material time, the chain of command was blurred if not confusing.

19. Further, the question arose as to whether the necessary tools were available to the Employee to facilitate the work which Mr. Stuart required him to perform. The evidence discloses that there were issues as to the whereabouts of particular tools from time to time.
20. It appears that these important questions and others, which we need not dwell on for present purposes, were glossed over by the Employer which appeared to place all its focus solely on what happened at the meeting on July 10, 2013.
21. In the circumstances, the consideration of the factual basis for the assigned reason and the application of the test of reasonableness under section C58 (2) of the Labour Code must be administered in the context of the overall situation, including what happened before as well as during the meeting.
22. The dismissal came after the suspension which itself was based on two grounds: the failure to comply with the instructions, on the one hand and what transpired at the meeting, on the other. It is clear that, from the Employer's perspective, the first ground was abandoned or spent with the suspension, so that the basis for the dismissal was exclusively the second ground.
23. In light of our findings of fact at paragraphs 13 and 14 above, the application of the test of reasonableness under subsection 2 of section C 58 becomes paramount. Did the Employer act reasonably or unreasonably in the circumstances?
24. In our opinion, there were lingering issues to be addressed which required a thorough fact-finding investigation as to what happened before the suspension. How did it really come about that Mr. Stuart's instructions were not carried out? Was there a wilful act of insubordination on the part of the Employee? Were there mitigating or militating circumstances? A proper investigation would have informed and influenced the meeting and its outcome.
25. In any event, in the face of the Employer's conclusion about the Employee's conduct at the meeting, it would have been reasonable to communicate to the Employee in writing about what was alleged against him arising from the meeting. Thereafter, a disciplinary hearing should have been convened which would allow the Employee ample opportunity to defend himself with the

assistance, if necessary, of a representative of his choice. The decision, if any, to dismiss the Employee should have been communicated only after that investigative process and the disciplinary hearing were completed.

26. In the circumstances, the question of natural justice emerges and becomes a critical factor in determining whether the Employee was unfairly dismissed. In our opinion, in the absence of a proper fact-finding investigation of the matters arising before and during the meeting, the Employer's action in dismissing the Employee was at least suspect and susceptible to challenge.
27. Further, there is a lingering question as to how adequately the matter was handled by the Human Resources Manager. In that regard, we note that the letter of suspension merely required the Employee to report to the office of the Human Resources Manager for a final decision. On that date, it would have been reasonable for the Employer to apprise the Employee of what was alleged against him, as stated in the dismissal letter, and give him the opportunity to speak on his own behalf and perhaps exculpate himself.
28. As to the requirement for a fair hearing, we remind ourselves of the significance of the same when applying the test of reasonableness. The existence of a potentially good cause for dismissal does not necessarily preclude a finding of unfair dismissal. The judgments of this Court in Reference No. 54 of 2013 **Humphrey Michael Blackburn v LIAT (1974) LTD.** (the Blackburn case) and Reference No. 66 of 2015 **Antigua and Barbuda Workers' Union v Cable and Wireless (Antigua and Barbuda) Limited** (the Cable and Wireless case) will suffice to illustrate this point.
29. In the **Blackburn case**, this Court determined that the Employee was guilty of misconduct which was serious enough to potentially justify his dismissal. However, the Court went on to consider the summary nature of the dismissal, which was effected 2 weeks after the alleged misconduct. The crucial question then was, as it is now, whether the employer acted reasonably or unreasonably in the circumstances. Paragraph 126 of that judgment is pertinent in this Reference. It reads:

" 126. At the end of the day, we find that, in the circumstances, following a fair procedure generally and providing the employee with the opportunity to be heard in particular, could have made a difference in the Employer's deliberations before the dismissal."
30. Further, at paragraph 127 of the judgment, the Court concluded that the employee "was dismissed in blatant contravention of the rules of natural justice and in breach of the principles of good industrial relations." In the final analysis,

it became clear that notwithstanding, the existence of a potentially good cause for dismissal, upon the application of the test of reasonableness, it was held that the Employee was unfairly dismissed.

31. In the **Cable & Wireless case**, it was held that there was a redundancy situation which constituted a potentially good cause for dismissal under section C 58 (1) of the Labour Code. However, upon application of the test of reasonableness it was held that the employees were unfairly dismissed. The determining factor was whether the employer acted reasonably in handling the redundancy situation.

32. In its conclusion in that judgment this Court held:

"111. For the foregoing reasons, we conclude that under the particular circumstances of this case, the actions of the Employer, taken as a whole, were not within the range of conduct which a reasonable employer should have adopted. In other words, we conclude that the Employer has failed to discharge its burden of proving on a balance of probabilities that it acted reasonably under the circumstances. Accordingly, we are constrained to determine this Reference in favor of the Union as the representative of the affected employees."

33. The foregoing approach and final determination of the matter by this Court were approved by the Court of Appeal in its recent judgment in Civil appeal ANUL TAP 2016/ 003: **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union**.

34. We adopt the settled approach used in both the **Blackburn** and the **Cable & Wireless** cases. And we have arrived at substantially the same result. At the end of the day, the Employer has not presented the required cogent and weighty evidence to justify the summary dismissal of the Employee. In other words, we conclude that the Employer has failed to prove that it acted reasonably in dismissing the Employee in the manner in which it did in the then prevailing circumstances.

35. We now turn our attention to the Employee's contribution to his dismissal. On the preponderance of the evidence, it is clear that he was guilty of misconduct which could have justified his dismissal but for the Employer's failure of the test of reasonableness.

36. Notwithstanding our finding that he was unfairly dismissed, we are of the opinion that the Employee contributed significantly to his dismissal. We assess

his contribution to be 50% and will reduce his compensatory award below by that percentage.

37. In arriving at our conclusion, we were obliged to have regard to section 10 (3) of the Industrial Court Act which requires us to determine matters "... in accordance with equity, good conscience and the substantial merits of the case...having regard to the principles and practices of good industrial relations and the Antigua and Barbuda Labour Code"

The Award

38. We award compensation as follows:

(a) Notice Pay

The Employee was earning \$3,786.00 per month at the date of his dismissal. Since he received no notice, he is entitled to pay in lieu thereof. Accordingly, **we award the sum of \$3,786.00** under this head.

(b) Loss of Protection

The period of employment was 4 years from July 1, 2009 to July 15, 2013. His compensation under this head is the equivalent of severance pay in a redundancy situation. Accordingly, **we award the sum of \$15,144.00** under this head.

(c) Immediate Loss

The evidence discloses that after his dismissal the Employee earned approximately \$1,500.00 per week, which is more than the amount earned while working for the Employer. As a result, we make no award under this or any other head.

39. In the premises, the total sum due to the Employee is \$9,465.00, being 50% of the total award.

Order

40. It is ordered that:

- (1) The Employer shall pay to the Employee the total sum of \$9,465.00 as compensation for his unfair dismissal.

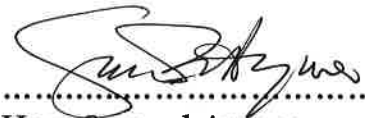
(2) Payment of the said sum must be made on or before 30th day of June 2019.

Dated this 31st day of May, 2019



.....
Hon. Charlesworth O.D. Brown
President

.....
Hon. Megan Samuel-Fields
Member



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Hon. Samuel Aymer
Member