

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 51 OF 2014

BETWEEN

KENROY CALLICA

Employee

and

BIG BANANA HOLDING COMPANY LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dr. Hayden Thomas

Member

The Hon. Judith Dublin

Member

Appearances:

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

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

2016: October 20

2019: May 31

JUDGMENT

Brown, P;

Background

1. The Employee commenced his employment with the Employer on 21st August, 1991. His last position was that of Sous Chef for which he earned \$1,966.91 per fortnight. He was required to report to the Executive Chef with whom he shared a close personal relationship.



2. Separate and apart from his employment with the Employer the Employee also carried on a small business whereby he prepared and sold food to the general public from a location at the West Bus Station.
3. On 05th June, 2010 the Employee had certain raw food items in his possession during the course of his employment. At the end of his shift at 11:00 p.m., with the voluntary assistance of other staff members, the Employee prepared the items for sale in his personal business. He utilized the facilities of the Employer to do so.
4. On 08th June, 2010 the Employee was summoned to a meeting with the Employer's management staff. At that meeting he admitted using the Employer's facilities from time to time to prepare food items for sale in his personal business. However, he took the position that there was a business arrangement between the Employer and himself whereby the Employer would sometimes borrow some of his utensils and he would be permitted to use the Employer's facilities. Moreover, the Employee also maintained that he had earlier obtained the approval of management to prepare his personal items on its premises and using its facilities.
5. By letter dated 10th June, 2010 the Employee was summarily dismissed on the ground that his "action as a whole is a most serious breach of the rules" which would not be tolerated. The Employer also asserted that the Employee had been "depriving the company of its substantial resources, both human and material, with impunity admittedly for months..."
6. According to the Employee, at all material times, his employment was subject to a Disciplinary Code which required the Employer to respectively warn or suspend the Employee in the first instance where he had committed the offences of either the "unauthorized use of facilities" or "using business property-machinery and equipment for an unauthorized purpose."
7. Being dissatisfied with his dismissal, the Employee commenced these proceedings, on 20th October, 2014 and identified the main issue between the parties to be "Unfair Dismissal".
8. In his Memorandum of Claim filed on 14th November, 2014, the Employee averred that during his tenure "he was never formally warned or written to" in relation to using the Employer's utensils. He also stated that he loaned a "few chafing dishes and other food and beverage utensils" to the Employer from time to time.

9. In its Memorandum of Defence filed on 6th June, 2016, the Employer averred that the Head Chef had persistently warned “the Employee to desist from preparing his private items in the Employer’s Kitchen. The Employer also pleaded that the Employee admitted wrong doing and that he was fully aware that he could have been dismissed but begged Management not to dismiss him.

The Legal Framework

10. 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) reads:

“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.”

11. 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. 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) 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."*

12. 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. That section provides:

"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."

13. 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.
14. 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.

The Evidence

15. In his oral testimony the Employee admitted that with the assistance of others in the kitchen, he prepared personal food items on Saturday nights. However, he maintained that he did so only at the end of his shifts. He admitted using the Employer's oil which he said would be discarded soon afterwards during the customary clean-up process.

16. According to the Employee, the meeting on June 8, 2010 was all about his use of the oil. He said that after the meeting, on the basis of his admissions, he was told to go home, which he did. He said that he was called back to the Employer's premises on June 10, 2010 on which date his employment was summarily terminated.
17. Under cross-examination, the employee admitted that he regularly used the Employer's soon-to-be-discarded oil and its "fryer" on Saturday nights at the end of his shifts. About the oil, he said, "they were going to throw it away". He also said that from time to time, other members of staff would voluntarily assist him to fry his plantains.
18. The Employee also stressed that he had been working for the Employer since he was a youth. To him, the Employer was like family and as such he believed that they could have been more considerate and deal with him more leniently.
19. The Employee also recounted the occasion when Mr. Lewis approached him regarding what he overheard about the Employee preparing his own food in the Employer's kitchen. In response, he told Mr. Lewis that he had earlier received permission from Garolyn, the Employer's former Restaurant Manager.
20. In her testimony on behalf of the Employer, Ms. Georgiana James, the Employer's Human Resources Manager stated that she was the main witness for the Employer although her employment commenced in December 2015, years after the Employee had been dismissed. In her view, in light of the Employee's admission of wrong-doing, his dismissal was not unfair.
21. The Employer's second witness was Mr Kenneth Lewis, the Head Chef. He acknowledged that he had the authority to issue verbal and written warnings to the Employee. He said that if the matter required more serious attention he would refer it to the Human Resources Manager.
22. Mr. Lewis testified that he recalled telling the Employee that it was not right for him to be preparing his own food on the Employer's premises. However, he said that he did not issue a written warning. Moreover, Mr. Lewis said that he spoke to the Employee in that vein but did not issue a formal warning because of the good relationship between them. Moreover, Mr. Lewis also testified that the Employee told him that he had permission from "Garolyn" or "bigger heads". He made no enquiries to ascertain whether such permission had in fact been given.
23. In addition, Mr. Lewis said that during the several years he worked for the Employer between 1991 and 2012 there was a close relationship and good

“comradery” between the Employer and its employees. He also recalled that the Employee had previously lent some “warmers” to the Employer.

24. Further, under cross-examination, Mr. Lewis said he was aware of the Employer’s Handbook but he never referred or showed it to the Employee.

Resolving the Main Issue

25. In the letter of dismissal dated June 10, 2010, the Employer referred to “a report” that the Employee had been running his small catering business from the Employer’s kitchen “for quite some time”. The specific allegation was that on June 5, 2010 the Employee brought certain personal items into the kitchen and had his subordinates prepare them using the Employer’s utensils and utilities.
26. During his oral testimony, the Employee admitted to the allegation regarding what happened on the 5th June, 2010 but said that he felt justified in doing so. Based on the evidence given by the Employee and Mr. Lewis, we made the following findings of fact which support the Employee’s position:
- (a) There was a tacit arrangement in place whereby he would lend some of his equipment to the Employer in consideration of which, the Employer permitted him to use its facilities towards the preparation of his items for sale in his personal business.
 - (b) He had earlier received general permission from “bigger heads”, and in particular from “Garolyn” the Employer’s former Restaurant Manager, to use the Employer’s facilities as he did.
 - (c) At the meeting on June 8, 2010, the Employee admitted to the allegation against him and explained the reasons for his action.
 - (d) The oil which he used at the Employer’s premises had been previously used by the Employer and was destined to be discarded the very night soon after he used it.
 - (e) Given his services to the Employer since he was a “youth”, there was in existence a close relationship between himself and the Employer whereby they treated each other like family and he would endeavor to assist the company whenever necessary.
 - (f) During his tenure of over 18 years, he had a good record and had never been formally warned or written to about any allegation of misconduct.
 - (g) He was not given a fair opportunity to be heard in his own defence at a proper disciplinary hearing.
 - (h) The Disciplinary Code, exhibited at trial, and relied upon by the Employee, did not allow for his dismissal for the alleged offence. In fact, that code required the Employer to either warn or suspend him in

the first instance where he had committed the offences of either the “unauthorized use of facilities” or “using business property-machinery and equipment for an unauthorized purpose.”

- (i) There was no conflict of interest because the Employer did not carry on business on Sundays, the sole day on which he conducted his small business.
- (j) Contrary to what was alleged in the dismissal letter, there is no evidence before us that he deprived the Employer of any of “its substantial resources, both human and material, with impunity”.

27. Whether the Employee’s dismissal was unfair harsh or cruel must be determined on the basis of the relevant statutory provisions and the foregoing findings of fact. In particular, the test of reasonableness under section C 58 (2) must be applied.

28. It cannot be over-emphasized that we did not have the benefit of testimony from Carolyn and /or any of the “bigger heads”. Moreover, our attention was not drawn by the Employer to any particular provision of the Collective agreement, the Employee’s Handbook or the Disciplinary Code on which it relied to support its case.

29. We have noted above the Employer’s obligation to prove its case by tendering evidence that is cogent and weighty in nature and content. The Employer has not discharged that obligation in these proceedings. Essentially, the evidence at trial pitted that of the Employee against Mr. Lewis. In certain important aspects, Mr. Lewis’ testimony supports the Employee’s contention that the dismissal was harsh.

30. Moreover, Mr. Lewis’ evidence leads or tends to lead to the conclusion that the Employer tacitly accepted or condoned the employee’s alleged misconduct. In light of repeated or extended reports or rumors of wrong-doing extending over several months, Mr. Lewis elected to issue no formal warning to the Employee but settled for mere “verbal warnings”. In the circumstances, it is our opinion that a written warning should have been given to the Employee bringing it home to him that, given the previous verbal warnings, any recurrence of his misconduct would have led to his dismissal.

31. The test of reasonableness under Section C 58 (2) of the Labour Code requires us to consider the Employee’s right to natural justice. In that regard, we are mindful that a denial of natural justice and procedural defects generally, by themselves, do not always render a dismissal unfair. However, in this instance, we are of the opinion that it was unreasonable for the Employer to summarily dismiss the Employee in the circumstances.

32. Accordingly, we find that the Employee was unfairly dismissed and he is entitled to compensation therefor.
33. However, in light of his admitted misconduct, we are of the opinion that the Employee contributed to his dismissal. As a result we assess his contribution to be 30% and will reduce his compensatory award accordingly.
34. 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

35. We award compensation as follows:

(a) Notice Pay

Having received no notice, the Employee is entitled an amount at least equivalent to his periodic pay. We are mindful that the Employee was paid fortnightly. However, in this instance, we believe that an amount equivalent to one month's pay is reasonable. Accordingly, **we award the sum of \$4,261.64.** (Fortnightly pay: $\$1966.91 \times 26 / 12$).

(b) Loss of Protection

The Employee worked for a period of 18 years and 9 months. Under this head he is entitled to the equivalent of severance pay. It is this Court's settled practice to award monthly paid workers at the rate of one month's pay per year of service. We are mindful that the Labour Code provides for payment at the rate of no less than the minimum prescribed therein. Having regard to all the circumstances, in our opinion, an award should be made at the settled rate for monthly paid workers. Given the Employee's monthly rate, **we award the sum of \$79,905.75** (monthly pay: $\$4,261.64 \times 18.75$).

(c) Immediate Loss

We are not satisfied that the Employee made diligent efforts to find alternative employment after his dismissal. As a result, **we award the nominal sum of \$8,523.28**, being the equivalent of two months' salary.

36. In the premises, **the total sum due to the Employee is \$64,883. 47**, being 70% of the total award.

Order

37. It is ordered that:

- (1) The Employer shall pay to the Employee the sum of \$64,883.47 as compensation for his unfair dismissal.
- (2) Payment of the said sum must be made by 3 equal monthly installments of \$21,627.82 commencing on 30th June, 2019.

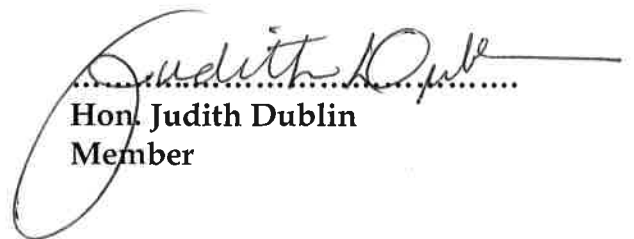
Dated this 31st day of May, 2019



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Hon. Charlesworth O.D. Brown
President



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Hon. Hayden Thomas
Member



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Hon. Judith Dublin
Member



Robert A. [unclear]