

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 54 OF 2014



BETWEEN

ORIEL WALTER

Employee

and

PHOTOGENESIS IMAGING SOLUTION LIMITED

Employer

**Before:**

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

The Hon. John Benjamin

Member

**Appearances:**

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

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

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2016: October 24

2019: June 07

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**JUDGMENT**

**Brown, P;**

**Background**

1. The Employee was employed by the Employer for a fixed-term of one year as a part-time Sales Representative commencing on September 1<sup>st</sup>, 2013. He was required to work a minimum of 3 days per week with at least 6.5 hours per day,

in consideration of which he received a basic salary of \$1,000.00 monthly. He was required to report directly to the Managing Director, Mr. Joseph Martin.

2. In May 2013, during a "light moment" at a meeting with members of the Employer's production team, Mr. Martin, made certain provocative comments which caused the Employee to respond using profane language. The following day, the Employee apologized for his behavior. No formal disciplinary action was taken against him.
3. On December 19<sup>th</sup>, 2013, while the Employee was on his off-day, he received a telephone call from Mr. Martin blaming him for certain errors in a particular "print job". Despite the Employee's protestations of innocence, Mr. Martin persisted with his allegations that the Employee had failed to follow the correct procedures. In response, the Employee told him that he was "chatting shit".
4. Following that conversation, although he was on his "off-day" the Employee, being remorseful, returned to the Employer's premises with a view to assisting with the resolution of the problem but he was ignored by Mr. Martin.
5. On the 20<sup>th</sup> December 2013, when the Employee returned to work as scheduled, he was told by Mr. Martin that his employment would be terminated. However, no date of dismissal was given.
6. By letter dated December 29, 2013, the Employee was dismissed. The terms of the dismissal letter are as follows:

" [LETTERHEAD]

*December 29, 2013*

*Mr. Oriel Walter*

...

*Dear Mr. Walter,*

*Re: Gross Misconduct towards Management*

*I've had the unfortunate circumstances of experiencing on 2 occasions your gross disrespect for me the Managing Director of Photogenesis Imaging Solutions Ltd.*

*On the first occasion in May of 2013, while enjoying a light moment with the production staff, you somehow took a statement that I made very*

*personally and proceeded to address me with profanity, whereby you stated, "What the fuc...k Mr. Martin you fuc... king ... say that. You na fuc... king. Na disrespect me like that. You fuc... king mother sc... nt?????????"*

*I excused myself from the conversation and never commented or return any hostile words to you. I was shocked by your demeanor, as I have come to expect much better from you. Your vulgar outburst was made in full view and witness of the entire production staff who also commented on the strange turn of event that resulted from the light moment we all were enjoying. All staff members present were very disappointed and to this day still commenting on it.*

*Upon your return to the office the next day I summoned you to my office where I indicated to you that such behavior will not be tolerated and as indicated by our code of conduct that you have signed and is on file, can be dealt with summarily dismissal.*

*The second occasion occurred on Thursday 19<sup>th</sup> December 2013. While communicating with you about my concerns regarding your handling of a print job which appeared to have been incorrectly sized, you once again attacked me verbally in the most disrespectful manner, whereby you said to me, "You a chat shit. You chatting shit. Mr. Martin you a chat shit".*

*Mr. Walter I have never been disrespectful to you in any form or have ever given you any reason to be disrespectful to me. I have always viewed you as potential management material because of your leadership qualities and experience in sales. I am totally disappointed by your actions and the turn that your employment with Photogenesis has taken.*

*As indicated by Photogenesis code of conduct, such behaviours are taken very seriously. On this premise, your services will no longer be required at Photogenesis.*

*Please be guided accordingly.*

*Regards*

*... ..  
Joseph I. Martin*

*cc....*

## The Evidence

7. The contents of the Employee's witness statement filed on January 9, 2015 were confirmed and amplified during his oral testimony at trial. The salient parts of his evidence are as follows:
  - (a) As to the "light moment" referred to in the dismissal letter, the Employee testified that he was provoked by Mr. Martin who openly insinuated that he participated in a gay event. He also testified that the following day he apologized for his behavior.
  - (b) As to the incident on December 19, 2013, the Employee explained his version of the situation leading up to the telephone conversation. He stated that Mr. Martin called him in an agitated state because a print file had been sent out at the wrong size. Further, the Employee testified that he explained to Mr. Martin that the error was not as a result of his fault.
  - (c) However, according to the Employee, Mr. Martin kept going on "back and forth" accusing him and alleging that it was his fault. The Employee then stated that: "At that point, I told him he was talking shit. I disconnected the call and continued my business as I was on my day off".
  - (d) The Employee also testified that as a result of his concern and remorse, he went back to the office but Mr. Martin did not acknowledge him. Further, the Employee testified: "Upon returning to work the next day I was told that I was going to be terminated".
8. Mr. Martin testified on behalf of the Employer. His witness statement is dated June 17, 2016. Some relevant parts of that statement as confirmed and amplified by him under oath are as follows:
  - (a) As to the incident on December 19, 2013, Mr. Martin emphasized that it was the Employee's responsibility to ensure that the print job was correctly sized for printing.
  - (b) Further, he testified that when the Employee returned to work the next day "I verbally advised him what my decision was going to be". Later, under cross-examination, he said, "He was told verbally and he got the letter 10 days later. The substantive dismissal was from the date the letter was received".
  - (c) As to the Employee's claim for his accrued salary for the month of December 2013, Mr. Martin testified that: 'If he is owed salary for December 2013, I agree that he will be paid'.

### The Closing Submissions

9. The Employee's closing submissions were made by Ms. Cicely Charles and filed on November 4, 2016. For present purposes, her more important submissions were as follows:

- (a) "The statute of limitations had expired on the use of the "light moment" as a factor. Therefore, we submit that it cannot be a consideration here". In that regard, Ms. Charles also submitted that even if it is to be considered for historical value, no warning letter was issued detailing the measures the Employer would take in the event of a repetition.
- (b) According to Ms. Charles, the Employee's verbal attack in isolation which occurred in December was not a just cause for dismissal. She submitted that the Employee tried to explain that the problem would not have arisen if the procedures in place were followed. She also said that the evidence highlighted a deficiency in the Employer's quality controls.
- (c) Regarding the date of receipt of the dismissal letter, Ms. Charles submitted that; "Antigua and Barbuda Labour Code Cap 27 section 10 (1) provides for the procedures when an employee is terminated. The Employer in this case is in breach of the law as it was some 10 days later that the Employer wrote the termination letter, even though the Employee was dismissed since 19<sup>th</sup> December, 2013. The evidence given is that the Employee, when he showed up for work the next day, 20<sup>th</sup> December 2013, was told that he would be contacted and that never happened until he received the dismissal letter..."

10. Closing submissions were filed by Mr. Carty on behalf of the Employer, on November 3, 2016. Some of his more important submissions are as follows:

- (a) Mr. Martin "acknowledges that the Employee, if he had not been paid, would be owed his salary for December, including for the period December 20 - 29".
- (b) As listed by Mr. Carty, the main issues for determination are:
  - (i) Does the fact that the Employee was not on active duty, mitigate his grossly disrespectful conduct towards the Employer on the day in question?

- (ii) Does the Employee's statement to the Employer on December 19, 2013 that "You ah chat shit! You chatting shit! Mr. Martin, You ah chat shit" amounts to grossly disrespectful conduct that would reasonably justify an act of dismissal?
  - (iii) Does the decision of the Employer to dismiss the Employee fall within the "band of reasonable conduct that an employer would, or is expected to have taken, in such circumstances?
  - (iv) Did the action by the Employer to terminate the Employee amount to an act of unfair dismissal?
  - (v) What was the legal and effective date of dismissal?
- (c) Further, in addressing those issues, Mr. Carty submitted:
- (i) The conduct of the Employee on December 19, 2013 went to the heart of the employment contract by breaching the implied term of mutual trust, respect and confidence.
  - (ii) Section C 59 (1) of the Labour Code speaks to justification for the dismissal if the conduct is committed "in or in relation to the employment".
  - (iii) The Employee was never mistaken or confused about, or was of the view that, his dismissal was effected on December 29 and not on December 19, 2013. In fact, neither in his Memorandum nor in his Witness Statement did the Employee plead or state that his dismissal was effected on the earlier date.

### The Main Issues

11. For present purposes we will adopt and adapt the 5 issues listed by Mr. Carty in his submissions.
- (1) Whether the Employee was guilty of gross misconduct towards Mr. Martin on December 19, 2013?
  - (2) Whether the misconduct of the Employee was mitigated by the fact that he was off-duty?
  - (3) Whether the effective date of dismissal was December 19 or December 29, 2013?

- (4) Whether the action of the Employer in dismissing the Employee falls within a band of reasonable responses which a reasonable employer would make in the particular circumstances?

### Resolving the Main Issues

#### Issue 1: Gross Misconduct on December 19, 2013

12. Section C 58 of the Labour Code provides for the fair dismissal of an employee if he is guilty of misconduct within the limitations of section C 59 (1). Those sections provide:

**“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 C59 (1) and (2);**
- (b) ....**

**(2) The test generally, for deciding whether or not a dismissal was fair is whether or not, under the circumstances, the employer acted unreasonably or reasonably.....and the test shall be whether the actual circumstances which existed....would have reasonably led to the employee’s dismissal”**

**“C59(1) 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; ”**

13. Section C59 (1) of the Labour Code clearly empowers an employer to dismiss an employee if two conditions are met. Firstly, the employee must be guilty of serious misconduct. Secondly, the employer must pass the test of reasonableness by reasonably forming the view that he has no choice but to terminate the employment relationship.

14. “Serious misconduct” is not defined in the Labour Code. However, based on human experience generally and employer/employee relations in particular,

there can be no doubt that some types of misconduct may be classified as gross or serious.

15. In considering this issue, we are mindful that in modern English usage, the word "shit" does not always have the same negative connotation which it originally had. In this case, our assessment of the offensive nature, if any, of the term "You ah chat shit" would depend on the implication or suggestion conveyed to the person to whom the words are spoken in the given circumstances. Clearly, quite apart from the primary literal meaning of the words, the context in which they are used must be taken into account.
16. In this case, the words are spoken by a subordinate to his direct supervisor, the Managing Director, they being in disagreement about an important procedural matter which had an impact on the Employer's business. How the words are received by Mr. Martin would necessarily be coloured by his past experiences as well as the then prevailing state of affairs.
17. In the absence of any clear provocation, as happened in the May 2013 incident, and taking all the facts and surrounding circumstances into account, we categorize the Employee's conduct as serious misconduct. That kind of misconduct could potentially warrant summary dismissal. However, having reached that threshold, the more challenging task is to assess the reasonableness of the Employer's action in response. We will return to that question when considering Issue 4 below.

## **Issue 2: Whether Misconduct Mitigated**

18. In her closing submissions, Ms. Charles emphasized that the Employee was off-duty and off the premises at the material time. In that regard, we note the decisive distinction between the express terms of section C 58 (1) and section C 59 (1) of the Labour Code. The former identifies "**misconduct on the job**" as a potentially good cause for dismissal within the limitations of the latter section. However, the latter section expressly provides for the Employer's right to dismiss where the Employee is guilty of "**misconduct in or in relation to**" his employment. It is clear that section C 59 (1) broadens the scope of misconduct beyond that on the job as referred to under section C 58 (1).
19. The evidence clearly disclosed that the misconduct relied on by the Employer was in fact in relation to his employment. The situation developed from the wrong sizing of the print job which occurred while the Employee was in fact on the job. The conversation between the Employee and Mr. Martin leaves no doubt

in that regard. In the circumstances, the fact that the conversation occurred while the Employee was off-duty is of no significant moment.

### **Issue 3: The Date of Dismissal**

20. In considering this issue, suffice it to say that we prefer the submissions of Mr. Carty relative to those of Ms. Charles. On the oral and documentary evidence before us, we find that the Employee was not dismissed on December 19, 2013 as submitted by Ms. Charles. In fact, he was dismissed by the letter dated December 29, 2013. And the dismissal took effect from that date.

### **Issue 4: The Band of Reasonable Responses**

21. In our conclusion on Issue 1, we found that, by having a potentially good cause for dismissal, the Employer had reached the threshold. Whether the dismissal was unfair turns on the reasonableness of the Employer's response. In that regard we are obliged to apply the test of reasonableness as set out in section C 58 (2) of the Labour Code.
22. Our duty is to decide upon the reasonableness of the action taken by the Employer and not to substitute our own view as to what the Employer should have done. The Employer's action is an exercise of its discretion. The decision to dismiss should be upheld provided that it falls within a band of responses open to an employer acting reasonably in the circumstances.
23. The Employer was entitled to either dismiss the Employee or administer a less severe form of disciplinary action. Obviously, the Employer exercised its discretion by electing the most severe punishment. It follows that the question as to whether the Employer acted reasonably or unreasonably must necessarily turn on the Employer's own assessment of the nature of the Employee's misconduct and its real, potential or perceived effect on the employment relationship.
24. In relation to the Employer's assessment of the nature and effect of the Employee's misconduct, we were reminded by Mr. Carty of the significance of mutual trust, respect and confidence between the parties.
25. Quite apart from express terms, there are implied terms imposed by law which are incidental to every contract of employment. One such term imposes an obligation of mutual trust and confidence between employer and employee. This

was settled in **Woods v WM Car Services (Peterborough) Ltd** [1981] ICR 666 and **Lewis v Motorworld** [1986] ICR 157,

26. In **Neary v. Dean of Westminster** [1999] IRLR 288 Lord Jauncey applied the Lewis case and held that:

**"Summary dismissal would be justified if the employee had behaved in a manner so inconsistent with the employment as to undermine the fundamental duty of trust and confidence...."**

27. Further, as always, we remind ourselves of Section 10 (3) of the Industrial Court Act which provides:

**(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 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."**

28. We have to take into consideration that summary dismissal is a strong measure which should be exercised sparingly. Proof of it requires cogent and weighty evidence. In this case the Employee admits using the alleged offensive words then hanging up the phone on Mr. Martin.

29. Moreover, we are mindful of the potential significance of the principles of natural justice generally and procedural fairness, in particular. In some cases, any semblance of the denial of natural justice after the occurrence of the misconduct could render a dismissal unfair. This case does not fall in that category. The exchange of words was directly between the Employee and Mr. Martin over the telephone. There were no witnesses. Having a customary disciplinary hearing would have made no difference to the eventual outcome in the face of the breach of the implied term for trust and confidence.

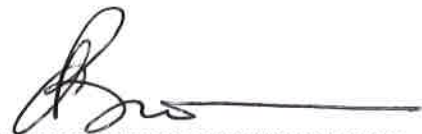
30. On the facts of this case, and having regard to the relevant provisions of the Labour Code and the Industrial Court Act as well as the submissions of the Representatives of the parties, we conclude that the Employer's action in dismissing the Employee falls within the band of reasonable responses which a reasonable employer would take in the circumstances. Accordingly, the dismissal was not unfair.

31. Finally, we note the Employer's concession that the Employee was not paid his salary for the Month of December 2013.

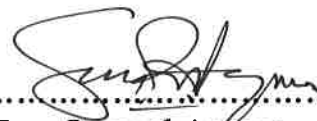
Declaration and Order

32. By reason of matters aforesaid, we declare that the dismissal was not unfair. And we order that the Employer do pay to the Employee the sum of \$1,000.00 being his basic salary for the month of December 2013. Payment of the said sum shall be made before June 30, 2019.

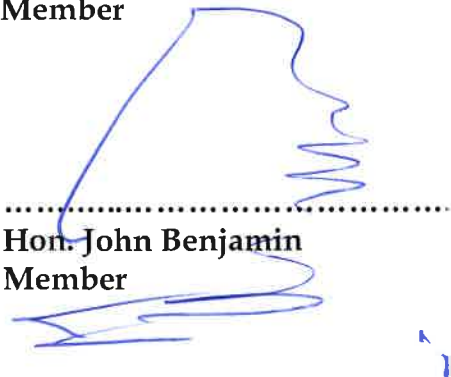
Dated this 7<sup>th</sup> day of June, 2019



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



.....  
**Hon. Samuel Aymer**  
**Member**



.....  
**Hon. John Benjamin**  
**Member**

