



ADVANCE COPY PENDING SIGNATURE OF MEMBER

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 56 of 2016

BETWEEN:

OTIS TEAGUE

Employee

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

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

Mrs. Karen A de Freitas-Rait of K.A. de Freitas-Rait Legal & Corporate Services
Consulting, Attorney-at-Law for the Employer



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2018: May 30

2019: May 08

JUDGMENT

Brown, P:

Background

1. The Public Utilities Authority, referred to in this Reference as Antigua Public Utilities Authority, is a body corporate established by the Public Utilities Act Cap.359 to provide electricity, water and telephone services in Antigua & Barbuda. It operates a plant, including an electricity power station, in Barbuda (the Premises) from which it conducts business on that island.
2. At all material times the Employee was the Supervisor at the Premises receiving a monthly salary of \$4,800.00 and a responsibility allowance of \$400.00. He had

28 years work experience and was the most senior employee deployed and resident on the island. As such, he was under the direct supervision of the Employer's Superintendent, Mr. Watley Rose, whose work base was in Antigua.

3. The Premises were completely fenced. Access was allowed through the main gate and /or two subsidiary gates. The Employee was in custody of or had direct access to the keys for the padlocks by which the gates were secured or opened from time to time.
4. On the 27th November, 2014 an "incident", described as a "protest action" or a "strike action" - which included or resulted in the lock-out of Mr. Rose and the shutdown of the Employer's generator - occurred on the Premises. Although he was in a position to do so, the Employee did not facilitate Mr. Rose's access to the Premises. As a result of the main entrance gate being locked, customers of the Employer were prevented from paying bills and conducting other business on the Premises for approximately one hour and a half. Ultimately, the "incident" culminated in an electrical "black-out" on the island on that night.
5. On the basis of the Employer's concern about the Employee's conduct and his role or participation in the "incident", he was first suspended by letter dated 27th November, 2014 for a period of 2 weeks to allow the Employer to conduct a full investigation. That suspension was extended on two occasions pending the completion of the investigation. Eventually, the Employee was dismissed by letter dated 27th January, 2015 after a suspension period of approximately 9 weeks.
6. The reasons for the Employee's dismissal are stated in the letter of dismissal, which is substantially reproduced as follows:

"27th January, 2015

*Mr. Otis Teague
Codrington
Barbuda*

Dear Mr. Teague,

This is to advise you that APUA has now completed its investigation into the events which occurred at the Barbuda Power Plant on 27 November, 2014, as they relate to you and your continuing suspension. Following are APUA's finding and decisions.

APUA is satisfied that you failed completely in your duties as a supervisor on 27 November, 2014 in that, when the gates to the APUA compound were unlawfully locked for approximately an hour and a half as part of an illegal employee protest:

- (i) You failed to take any action to report the same to your immediate supervisor Mr. Rose or indeed to anyone in a position of authority at APUA.*
- (ii) You failed to make any or any reasonable effort to determine who had locked the gates, or else you knew who locked the gates but failed to disclose the identity of such person (s) and take appropriate action in respect of the same.*
- (iii) You failed to take any reasonable steps to have the gates re-opened.*
- (iv) You failed to call the police, or to take any other reasonable action to quell the protest and facilitate the resumption of ordinary business at the Plant.*
- (v) You refused to answer and/or failed to return several telephone calls from APUA management who tried to contact you during the protest.*
- (vi) You failed to take any or any sufficient interest in protecting APUA staff and property or in resolving the protest and treating it with appropriate urgency and seriousness.*

By your own admission you stood by without raising a single, meaningful objection to the actions of the protestors. Your actions and omissions on that day are indicative of contempt for the authority of your immediate supervisor, Mr. Rose, and gross disregard for the management, staff and property of APUA. Further they have completely eroded the foundation of trust necessary to maintaining an employment relationship. Such behaviour amounts to insubordination and serious misconduct which would, without more, justify termination of your employment.

However APUA is also satisfied that the said protest was largely orchestrated to benefit you personally, by attempting to coerce APUA into removing Mr. Rose from his then position and into promoting you to that position. Your silence and inaction in the face of a protest intended for your benefit either was or should have been reasonably expected by you to operate as tacit approval and encouragement of the protest actions. Such behaviour by you therefore very likely

contributed to the continuation of the protest even after you were suspended from active duty late that day.

Further still, APUA has good reason to believe that you were actively involved in the protest and that you admitted in the presence of Mr. Rose and others to having personally been responsible for locking at least one of the gates. You were invited to a meeting on 21 January, 2015 to provide you with an opportunity to respond to such information gathered during the investigation. However, at that meeting, after taking the advice of your representative, you refused to answer any questions, and indicated that you did not wish to have any further discussion on the matter with APUA.

It is significant that as a consequence of the gates being locked some employees on the premises may have been unlawfully detained, while, on the other hand, Mr. Rose and some members of the public were refused or unable to gain access to the premises. Ultimately, the electricity generators were turned off by protestors that evening, causing an electrical "black-out" which lasted several hours and affected most of Barbuda.

In all the foregoing circumstances, APUA cannot reasonably be expected to continue an employment relationship with you. Your employment is therefore hereby terminated with immediate effect.

A cheque representing your salary up to and including 28th January, 2015 and unused vacation leave of sixty-five (65) days will be available for collection from Mr. Clinton Davis- Senior Supervisor or his designate at the Barbuda Power Station (BPS) on 28th January, 2015. Any outstanding loans or advances owed to APUA and/or APUA credit union will be deducted from your entitlements.

You are required to deliver, your APUA identification card, cell phone, all keys to APUA facilities, uniforms and any and all other APUA property in your possession to Mr. Davis prior to your cheque being released.

We extend wishes for better success in your future endeavours.

Sincerely,

*... ..
Rodney Simon (Mr.)
Human Resource Manager*

cc..."

7. Being dissatisfied with his dismissal, the Employee commenced these proceedings by filing the Reference on the 22nd September, 2016.

The Dispute

8. In his Memorandum of Claim filed on 22nd September 2016, the Employee contends that he was unfairly and constructively dismissed by reason of his extended suspension for approximately 9 weeks contrary to the limitation of 4 weeks stipulated in the definition of suspension in section B 3 of the Antigua & Barbuda Labour Code (the Labour Code). More specifically, the Employee pleaded that: *"The Company's violation of Division B 3 of the Labour Code amounted to a Constructive and direct dismissal."*
9. In the alternative, the Employee pleaded:
"... if it is determined that the violation of B 3 of the Labour Code does not amount to an unfair dismissal then the substantive matter should be set up for trial."
10. The Employee also pleaded that if the Employee was guilty of the alleged misconduct, which he denied, the Employer acted in breach of item No. 22 of the agreed Disciplinary Code as set out in the subsisting Collective Agreement between the parties. Under the Disciplinary Code, the only relevant offence was a failure to report damage to the Employer's property for which the maximum penalties permitted on the first two occurrences of such an offence were suspensions.
11. The Employer disputes the Employee's claim on three main grounds: Firstly, that the Employee's misconduct was so serious that it justified his summary dismissal. Moreover, the Employer contends that the consequences of the Employee's misconduct included a prolonged blackout on the island; a widespread disregard for the Employer's rules; a general disrespect for the established chain of command; and the usurpation of the Employer's property in Barbuda.
12. Secondly, the Employer maintained that there was no constructive dismissal of the Employee because the Employer committed no repudiatory breach of the contract of employment as the Employee continued to receive and accept his salary and other benefits for the entire period of his suspension.
13. Thirdly, the Employer asserted that section B 3, being a definition section only, does not mandate or prohibit any action by the Employer. Moreover, according

to the Employer, the definition of suspension has no applicability in instances of “investigatory suspensions” and the determination of the proper length of the suspension should be guided by reasonableness in the circumstances.

The Main Issues

14. The four main issues arising in this Reference are:

- (1) Whether the suspension for the period exceeding 4 weeks resulted in the termination of the Employee’s employment?
- (2) Whether the Employee was constructively dismissed?
- (3) Whether the Employee committed serious misconduct which rendered his continued employment untenable and justified his dismissal.
- (4) Whether the Employer acted reasonably or unreasonably in the circumstances when it dismissed the employee?

The Closing Submissions

15. In his closing submissions on behalf of the Employee, under the heading “the Law”, Mr. James emphasized the definition of suspension and submitted that on or before the meeting to which the Employee was invited on January 21, 2015, the Employee had communicated to the Employer that he was no longer participating in the investigative process because he considered himself as having been dismissed.
16. Further, Mr. James submitted that, based on the contractual prohibition against suspending an employee without pay beyond 4 weeks, in the Appendix of the Collective Agreement, the maximum period for suspension with pay is also 4 weeks.
17. In addition, Mr. James submitted that the Employer not only unlawfully terminated the services of the Employee, it waived its right to do so because it failed to act within the four week period during which it was entitled to suspend him.
18. Ultimately, Mr. James submitted that, taking all things into consideration, the Employee was unfairly dismissed and should be compensated therefor. He cited the judgments of this Court in **Reference No. 23 of 2011 Berlinda Dowe v Carlisle Bay Resort** (the Dowe case) and **Reference No. 20 of 2012: Roy Hector v Colin Abbott t/a Abbotts Construction** (the Hector case).
19. In her closing submissions on behalf of the Employer, Learned Counsel highlighted the several admissions of the Employee that: he was part of the

“protest action”; instead of opening the gates to allow his direct supervisor onto the premises he told him “we do not want you in the yard”; he was angry and disrespectful to his supervisor; and he continued to receive his salary and other benefits during the entire suspension period.

20. As to the credibility of the witnesses, Mrs. deFreitas-Rait submitted that the witnesses who testified on behalf of the Employer were more credible than the Employee. She noted that he was often evasive and contradictory. Learned Counsel also highlighted aspects of the uncontroverted evidence of the Employee’s misconduct. She emphasized that: the Employee locked out his supervisor; the power station was taken hostage; the Employer’s customers were prevented from transacting their usual business; the Employee’s conduct went beyond insubordination and raised concerns about violence and unruliness.
21. As to the Employee’s claim of constructive dismissal, Counsel relied on the leading case of **Western Excavating (EEC) Ltd. v Sharp [1978] 1 All ER 713** (the **Western Excavating case**), and submitted that even if the Employer was in breach of section B 3, which she denied, the Employee was not constructively dismissed. Mrs. deFreitas-Rait also submitted that there was and could be no breach of section B 3 and that even if there was, that breach did not constitute a repudiatory breach so as to ground the Employee’s claim of constructive dismissal.
22. Learned Counsel also cited the landmark judgment in Suit No. 21 of 1993: **Universal Caribbean Establishment v James Harrison** (the **Harrison case**) and submitted that in the face of a mere definition of suspension, there was no statutory limit to the duration of an “investigatory suspension”.
23. In addition, Counsel submitted that there was no breach of the Disciplinary Code in the Collective Agreement and that the duration of the investigatory suspension was reasonable in all the circumstances.

Issue 1: Section B 3 – Suspension

24. In considering the meaning and significance of “suspension” in the Labour Code, we rely on settled principles of interpretation. For that purpose, we rely on the **4th Edition of Halsbury’s Laws of England. Volume 44 (Halsbury’s)**, at paragraph 863 of which, the learned authors state a cardinal rule of the construction of statutory provisions as follows:

"863. Primary meaning to be followed. If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."

25. In relation to interpretation sections, at paragraph 845, the learned authors assert that:

"845. Interpretation sections. ...In the construction of an interpretation section it must be presumed that Parliament has been specially precise and careful in its choice of language, so that the rule that words are to be interpreted according to their ordinary and natural meaning carries special weight"

26. Having stated those rules of interpretation, we note that the definition of suspension was introduced to Interpretation Section of the Labour Code by section 4 of the Antigua & Barbuda Labour Code (Amendment) Act. No 16 of 1998 (the 1998 Amendment). The amendment was passed over 22 years after the Labour Code was first enacted in 1975. Section 4 of the 1998 Amendment provides:

"4. Section B 3 of the principle Act is amended by inserting immediately after the definition of the words "severance pay" appearing therein the following-

"suspension" means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct."

27. As expressed in Section B 3, a "*suspension*" may arise "*as a penalty or pending investigation of the employee's alleged misconduct.*" As we understand the definition, a suspension may be grounded on either punitive or investigative motives. Each of the two categories may be either with pay or without pay. As a result, there are in fact four distinct types:

- a. A punitive suspension with pay;
- b. A punitive suspension without pay;
- c. An investigative suspension with pay; and
- d. An investigative suspension without pay.

Clearly, the definition concisely identifies the four types seamlessly and states a single maximum period of 4 weeks.

28. Parliament passed the 1998 Amendment knowing that the only use of the term "*suspension*" was in Section C 59 (2) which provided that "*suspension without*

pay” was a legitimate form of disciplinary action where an employee was guilty of misconduct. There was no distinction between suspension as a “*penalty*” and suspension “*pending investigation*”. And there was no mention of suspension with pay.

29. In the circumstances, learned Counsel argued that the introduction of the definition of suspension in 1998 was merely intended to limit the suspension period under the pre-existing subsection C 59 (2). She submitted that in the absence of any explanatory, qualifying or other substantive provisions imposing a penalty for its breach, the definition is of very limited and narrow application and does not extend to investigative suspensions. We will now consider that proposition.
30. Giving the words in the definition their ordinary meaning, we are constrained by them and must look elsewhere in the Labour Code, construe it as a whole and attempt to glean the true and full import of the definition. To that end, we will put the definition in the context of the other provisions of the Labour Code and consider the other relevant sections in which the term suspension is used.
31. In relation to the construction of statute as a whole, we will rely on the following authoritative assertions of the authors of **Halsbury’s**:

“872. Statute to be construed as a whole. ... For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.

“Thus a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute....”

We note that reliance was placed on that paragraph by the Court of Appeal in the landmark judgment in Suit No. 21 of 1993: **Universal Caribbean Establishment v James Harrison**. Naturally, we will be guided by that approach.

32. Importantly, we observe that, apart from introducing the definition in section B 3, the 1998 Amendment also effected amendments to sections B 9, B 12 (1) (b) and C 59 (2). The pre-existing provisions of those sections provided:

“B 9 (1) Any question, petition, charge or complaint concerning severance pay as covered by Part 4 of Division C hereof, concerning alleged unfair

dismissals as covered by Part 5 of Division C hereof, representation questions as covered by Division J hereof or infringements as covered by Part 1 of Division K hereof, which shall have been referred for formal handling as provided in section B 6 (2) (c), herein, shall be heard and determined by a Hearing Officer”.

“B 12 (1) (b) in an unfair dismissal matter, he may order the payment of a sum of money equal to loss of wages sustained and, in addition thereto he may also order the reinstatement of the person dismissed or the payment of a sum of money in lieu of such instatement;”

“C 59 (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 repetition; which action may include suspension without pay for such period as may be specified in the written warning; and, thereafter, if the employee is, within 6 months following receipt of the written warning, guilty of misconduct in or in relation to his work which is the same or substantially the same as the misconduct in respect of which the written warning was given, the employer may terminate the employment of said employee or take such other action as may have been specified in the written warning.”

33. Sections 5, 6 and 19 of the 1998 Amendment provide:

“5. Section B 9 of the principal Act is hereby amended in subsection (1) by the insertion immediately after the word ‘dismissals’ appearing therein line 3 of the words “or suspension”

“6. Section B 12 of the principal Act is amended in subsection by the repeal of paragraph (b) and by the substitution thereof of the following-

(b)in an unfair dismissal or suspension without pay matter, he may order the payment of a sum of money equal to loss of wages sustained and, in addition thereto he may also order the re-instatement or restoration of the person dismissed or suspended, or the payment of a sum of money in lieu of such reinstatement”.

“19. Section C 59 of the principal Act is amended as follows-

(a) by the repeal of subsection (2) and the substitution therefor of the following:

‘(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.

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

(4) Where, within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.”

34. It is clear that the 1998 Amendment significantly broadened the scope of complaints to include one of “unfair suspension without pay” under section B 12 (1) (b), as amended. It is clear that quite separate and apart from complaints of unfair dismissal, there now exists a new category of complaints of “unfair suspension” in cases of suspension without pay.
35. Further, we note that section C 59 (2) as amended, deals with situations where the misconduct of which an employee is guilty is not serious enough to warrant summary dismissal under C 59 (1). In such situations, the subsection provides for a warning, stipulating the action the employer intends to take in the event of the occurrence of the same or similar type of misconduct.
36. Section C 59 (1) provides that an employer may summarily dismiss an employee who is guilty of serious misconduct:

“ C 59 (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) ...

(c)”

37. Section C 59 (2), as amended, provides for a warning to be given to the employee where C 59 (1) does not apply.

“C 59 (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.”

38. Like subsection (2) before the 1998 Amendment, the newly added subsection (3) expressly provides for “suspension without pay” as a penalty for misconduct.

“C 59 (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.”

Clearly, there is no limit on the suspension period expressed in that subsection.

39. Subsection (4) limits the time period to 6 months within which the employer may terminate the employment of, or (by implication) suspend the employee if he is guilty of misconduct as serious as that for which he was warned.

"C 59 (4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning."

40. Accordingly, the definition of suspension is relevant not only to disciplinary action under Section C 59 (2) (3) and (4) but is also relevant to complaints of unfair suspension without pay, under section B 12 (1) (b). There is no mention of or express reference to "suspension with pay" or "investigative suspension" in any of those subsections.
41. The remedies for unfair dismissal are well settled. They range from reinstatement to compensatory and punitive awards. The remedy for an unfair suspension without pay is *"the payment of a sum of money equal to the loss of wages sustained and in addition thereto... the reinstatement or restoration of the person... suspended, or the payment of a sum of money in lieu of such reinstatement."*
42. In our opinion, the result of the foregoing is that, in so far as suspension without pay under section C 59, as amended, is concerned, the pertinent subsections must be read within the limitations of the definition of suspension under section B 3. The definition operates to place an obligation on the employer to limit a suspension without pay to no more than 4 weeks. From the employee's perspective, the definition operates to establish a right not to be suspended without pay for a period in excess of 4 weeks. The remedy for the breach of that right is established under section B 12 (1) (b).
43. In the circumstances, we do not agree with Counsel's submission that the effect of the definition in Section B 3 should be limited to that Division of the Labour Code. Moreover, the effect of the definition should not be restricted to punitive suspensions. In our view, the definition applies to all types of situations where an employee is suspended without pay either as a definitive final penalty or as an intermediate step pending further action by the employer after its investigation. Accordingly, we decline to treat an "investigative suspension" as a separate category which could extend beyond 4 weeks.
44. However, we find that statutory lacunae exist in relation to "investigative suspensions" and "suspensions with pay". It is not within our purview to attempt to fill the void. However, we have to do our best to avoid inconsistency, repugnancy or absurdity in the definition in order to make the Labour Code

operative as a whole. In that vein, we redirect our attention to consider the effect of the statutory provisions vis-a vis the fundamental contractual rights of the parties under the employment contract.

45. At paragraph 904 of **Halsbury's**, under the heading: "*Statutes affecting existing Rights and Principles of Law*" the learned authors assert:

"904. ... Except insofar as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law..."

46. At common law, there are certain terms which are necessarily implied in order to give efficacy to the contract of employment. In the circumstances, we turn our attention to the common law as an aid to the construction of the Labour Code. It is no secret that the new rights created by the Labour Code have their foundations in the common law.
47. In our opinion, the definition of suspension implies that, at common law, an employer is empowered to suspend an employee "*with or without pay*" and "*as a penalty or pending investigation*". That implied power arises from and does not extinguish common law rights based on established principles of law. There are, for example, implied obligations on the employer not to breach the common law implied term of *reasonableness* or that of *trust and confidence*. A breach of any one of those implied terms may constitute repudiatory conduct on the part of the employer which may lead to a constructive and unfair dismissal.
48. In our opinion, unless there are reasonable grounds for the imposition of a punitive or investigative suspension and the continuance thereof beyond 4 weeks, such a suspension is likely to constitute repudiatory conduct and probably lead to a finding of constructive and unfair dismissal. In other words, in situations where investigative suspensions and suspensions with pay in excess of 4 weeks are imposed, the outcome of a complaint challenging such a suspension or alleging a constructive and unfair dismissal will turn on whether or not there was a breach of one or both of those common law implied terms.
49. There is no provision in the Labour Code creating a direct causal link between a suspension without pay exceeding 4 weeks and a constructive or unfair dismissal. An employer's failure to keep a suspension to no more than 4 weeks may result in a valid claim of unfair suspension, especially where the suspension is without pay. In other situations, such a breach may be considered as part of the overall circumstances of a particular case and may ground a claim of constructive dismissal. Alternatively, it may become a critical aspect of the statutory test of the employer's reasonableness or unreasonableness in the particular circumstances. In the further alternative, it may amount to a breach of

the common law implied term of *reasonableness* and /or that of *trust and confidence*.

50. Thus, in our opinion, a breach of the limitation period of suspension does not automatically result in the termination of the contract of employment. However, there may be instances where a punitive suspension without pay under section 59 (3) in excess of 4 weeks could constitute the basis for a successful claim of constructive dismissal. The same logic applies to investigative suspensions with pay, as in this instance. Each case turns on its own facts, as demonstrated in the **Dowe case** and the **Hector case**.

51. In the **Dowe case**, the employer suspended the employee without pay for a period exceeding 4 weeks while it awaited the outcome of criminal proceedings against her in the Magistrate's Court. After a detailed analysis of the law and the facts, this Court, as then constituted, held that:

- The employer owed a duty to the employee not to suspend her for more than 4 weeks.
- The employer breached that duty when it suspend the employee indefinitely.
- A breach of the employee's right not to be suspended beyond 4 weeks "created a remedy which crystallized" into her claim of unfair dismissal.

52. In that Reference, this Court then went on to discuss two issues: (a) whether the employee was guilty of misconduct; and (b) whether the employer acted reasonably or unreasonably. At the end of the day, it was held that the Employee was not guilty of misconduct under section C 58 (1) and that the employer acted unreasonably under section C 58 (2). Accordingly, it was determined that employee was unfairly dismissed.

53. In the **Hector case**, the employee was also suspended without pay for an indefinite period. After consideration of the facts and the law, this Court held that:

- Having effected a suspension for an indefinite period, the employer had a duty to ensure that it did not go beyond the statutory limit of 4 weeks.
- The suspension for an indefinite period which exceeded 4 weeks amounted to an unfair suspension.
- On the 29th day after the start of the suspension, the employee's employment was effectively terminated.

In that Reference, this Court went on to consider whether that termination, in the circumstances, could constitute a proper temporary termination of the employee's employment under section C 42 of the Labour Code. In the final analysis, upon consideration of the alleged misconduct of the employee under section C 58 (1) and the application of the test of reasonableness under section C 58 (2), it was held that the employee was unfairly dismissed.

54. Both the **Dowe** and the **Abbott** cases are easily distinguished from this Reference. Both of those involved punitive suspensions without pay and not investigative suspensions where the employers were actively pursuing investigations. However, most importantly, on each occasion this Court went beyond the issue of the length of the suspension period, considered the alleged misconduct and applied the statutory test of reasonableness.
55. Given the limited statutory provisions, and the facts of this case, we are constrained to conclude that after the fourth week of suspension, the Employee was no longer on suspension as defined in section B 3 of the Labour Code. As such, he was entitled to return to work on the day immediately after the expiration of the first 4 weeks of his suspension. And the remedy available to him at that stage would have been an order restoring or reinstating him to the situation immediately before the suspension and compensating him for any loss suffered.
56. On the facts of this case, we also conclude that important aspects of the employment relationship subsisted beyond 4 weeks of the statutory suspension period. In the circumstances, the contract of employment was not frustrated or otherwise terminated by the operation of Section B 3 of the Act. In that regard, the evidence is clear: there was no termination of the employment contract as the Employer tendered and the Employee accepted his salary and other benefits during the extended suspension period. The Employee also participated as an employee in at least two interview sessions with the Employer during the suspension period.
57. We now turn our attention to the question as to whether the protracted suspension beyond the statutory limit "crystalized" into a constructive or unfair dismissal.

Issue 2: Constructive Dismissal

58. As to issue No. 2, we first consider the nature of constructive dismissal. As correctly pointed out by Counsel, the concept of constructive dismissal is inherently grounded on the contractual relationship between an employer and employee. Without repeating the quotation of the dicta of Lord Denning in

Western Excavating case, on which Counsel relied, it will suffice to say that constructive dismissal originates from conduct of the employer which goes to the root of the contract of employment and entitles the employee to treat himself as being wholly discharged from any further performance under it. Thus, the genesis of a claim of constructive dismissal is not the express statutory provisions of the Labour Code but rather the applicable fundamental principles of common law.

59. However, there are certain obligations on the employee who wishes to pursue a claim of constructive dismissal. This Court considered the concept of constructive dismissal in several cases including Reference No. 35 of 2012: **Wayne Weaver v. St. James Club**. In that case, at paragraph 70 of the judgment, this Court determined that there are 4 essential requirements for a successful claim of constructive dismissal. It was held that:

“... a constructive dismissal will be fully constituted when:

- (1) The conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment;*
- (2) The repudiatory conduct must be such that it undermines or erodes or destroys the contractual relationship;*
- (3) The employee’s response to the employer’s repudiatory breach is directly referable to the employer’s conduct;*
- (4) The employee must get his timing right. He must not work too long after the breach and must not conduct himself in such a way as to waive his right and thereby affirm the contract;”*

60. In the premises, Counsel’s submissions on this issue find favour with us. More specifically, we find that :

- (a) There was no repudiatory breach on the part of the Employer of either the implied term of *reasonableness* or the implied term of *trust and confidence*. The Employer continued to pay the Employee his full salary, maintained contact with him and updated him on progress during the investigation process. The Employee did not resist or object to the Employer’s continued treatment of him as its employee.
- (b) The Employee did not either resign or make a clear and unequivocal declaration that he treated the suspension beyond the statutory limit as a repudiatory breach of the contract. To the contrary, the Employee continued to accept his salary and other benefits from the Employer and continued to communicate with it on several occasions during the suspension period. The evidence discloses no clear and unequivocal notice by the Employee to the

Employer that he accepted the latter's conduct as a repudiatory breach of the contract of employment.

- (c) In the totality of the circumstances, the employment contract was not undermined, eroded or destroyed although the suspension went beyond the statutory limit.
- (d) The Employee did not get his timing right. He continued to treat himself as the Employer's employee for too long after the expiration of the statutory suspension period. In communicating through his union representative that he would no longer participate in the investigation process was too, little too late. In the circumstances, the Employee affirmed the contract of employment subsequent to the expiration of the first 4 weeks of the suspension.

61. In the final analysis in respect of this issue, we find that there was no constructive dismissal.

Issue 3: Serious Misconduct

62. Although serious misconduct is not defined or circumscribed in the Labour Code, it is well settled that it is similar, if not identical, to gross misconduct as understood at common law. In that regard, **Black's Law Dictionary 10th Edition** defines "misconduct", "gross misconduct in the workplace", "willful misconduct of an employee", and "serious and willful misconduct" as follows:

"Misconduct - A dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust."

"Gross misconduct in the workplace - Intentional or reckless behavior that might harm someone, esp. a fellow employee, or the employer. Gross misconduct may include acts in disregard of the safety of others, unlawful discrimination, libel, harassment, and various criminal offenses."

"Willful misconduct of an employee - The deliberate disregard by an employee of the employer's interests, including its work rules and standards of conduct, justifying a denial of unemployment compensation if the employee is terminated for the misconduct."

"Serious and willful misconduct - An intentional act performed with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."

63. Section C58 (1) of the Labour Code conditionally provides that misconduct may properly constitute a good cause for dismissal. The primary condition is that there must be a factual basis for that assigned reason. Moreover, the assignment of misconduct as a good cause for dismissal is subject to the limitations imposed by Section C59.

“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) ...

(c) ...

(d) ...

(e) ...

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

64. The factual bases for the Employer’s conclusion that the Employee is guilty of serious misconduct, are summarized in the dismissal letter set out at paragraph 6 above. In her closing submission, Counsel for the Employer highlighted the Employee’s role in locking out or allowing the lock out of the Superintendent his supervisor, Mr. Rose. Counsel also highlighted the effect of preventing customers from transacting their usual business on the Employer’s premises. Moreover, she referred to the threat of and the occurrence of a full electricity black-out in the whole of Barbuda.

65. It is not in dispute that the Employee was the most senior resident employee and officer-in-charge of the Employer’s operations in Barbuda on a day-to-day basis. Counsel submitted that by virtue of his seniority he had a special responsibility to prevent, limit or stop the “unruly situation” which he failed to do. We agree.

66. For completeness, we note in passing that substantial portions of the Employee’s evidence are less than credible. In the circumstances, needless to say, wherever material differences arise between the Employee’s evidence and that given on behalf of the Employer, we prefer the latter.

67. At the end of the day, based on the evidence as a whole and several admissions of the Employee, in particular, we are persuaded by Counsel’s submissions on this issue. Accordingly, from the perspective of any of **Black’s** definitions of misconduct, we find that the Employee is guilty of serious misconduct, which,

subject to the test of reasonableness, could successfully ground his dismissal under Section C59 (1) of the Labour Code.

Issue 4: Reasonableness

68. There is no doubt that, notwithstanding the existence of any potentially good cause for dismissal, the ultimate statutory test as to whether a dismissal is unfair is whether the Employer acted reasonably or unreasonably in the circumstances. In that regard, Section C58 (2) 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.”

69. The inherent components of the statutory reasonableness test arise from and include aspects of natural justice at common law such as the requirements for:
- (a) An open, full and impartial fact-finding investigation.
 - (b) A statement of the allegations against the accused with an opportunity to be heard in the presence of his accusers.
 - (c) The adherence to a proper procedure under a collective agreement and/or as dictated by statute.
70. It is well settled in case law that the absence of a fair hearing does not necessarily render a dismissal unfair. These are instances where an employee’s conduct is so egregious in nature and well-grounded in fact that a fair hearing would make no difference. Although this may be one such instance, we will consider each of the three aspects of natural justice noted above.
71. At the onset, without repeating details of their testimonies, it will suffice to say that we find Mr. Rose, Mr. Nicholas, Mr. Simon and Mr. Clarke, the Employer’s Superintendent, Chief Mechanical Engineer, Human Resources Manager and Labour/Employee Relations Officer respectively, to be credible witnesses. We have no doubt that the Employer carried out a comprehensive investigation on the basis of which it formed its views about the Employee’s conduct. As to the duration of the investigation, we have taken into consideration the fact that the incident occurred in Barbuda, which automatically gave rise to logistical challenges. At the end of the day, based on both the statutory provisions and the common law, we are satisfied that the Employer acted reasonably and carried out a proper investigation.

72. As to knowing what was alleged against him, we find that by reason of the letters written to him, especially that dated 12th January 2015, the two interviews to which he was subjected in November and December 2014, and the meeting which he attended on 21st January, 2015, the Employee knew substantially what was alleged against him.
73. As to a fair hearing, we are satisfied that at least the meeting convened on 21st January, 2015 provided the Employee reasonable opportunity to be heard in his own defence. In our opinion, in the circumstances, it was not necessary for the Employer to label that meeting a “disciplinary hearing” or to carry out any particular related form of procedure.
74. As to the Collective Agreement, the Employee’s reliance on aspects of the agreed Disciplinary Code is misguided. The categories and types of misconduct cannot be exhaustively listed in any one document, much less in the Disciplinary Code. It is not surprising that item No. 35 is stated as it is *“any other serious misconduct by an employee ... not previously defined...”*. Moreover, as stipulated in Agreement *“the Authority reserves the right to treat any offence on the merit of the particular case”*. We adopt Counsel’s submission in that regard: what constitutes reasonable disciplinary action in a particular case must be determined on the facts of that case.
75. Finally on this issue, we find that there was no breach of the principles of natural justice of such magnitude, or at all, to render the dismissal procedurally unfair. Moreover, we find no instance of breach of the Disciplinary Code or other unreasonable action contrary to the Collective Agreement, or otherwise, on the part of the Employer. In short, the Employer passed the test of reasonableness.

Conclusion

76. For reasons stated above we find that notwithstanding the protraction of the suspension, there was no constructive dismissal. The Employer acted reasonably on the basis of the Employee established serious misconduct and properly effected the dismissal by letter dated 27th January, 2015. The Employer was entitled to conclude, as it did, that the Employee’s conduct eroded the foundation of trust and confidence necessary for the maintenance the employment relationship. And the Employer could not reasonably be expected to continue that relationship.

77. In the premises, the Employee's claim of constructive and/or unfair dismissal is dismissed with no order as to costs.

Dated the 08th day of May, 2019



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Hon. Charlesworth O.D. Brown
President



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Hon. Samuel Aymer
Member

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Hon. Megan Samuel-Fields
Member

