

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 7 OF 2015



BETWEEN:

DAMIEN O'CONNOR LYNCH

Employee

and

KENNY GARDNER t/a VCNG CLOTHING STORE

Employer

Before:

The Hon. Dr. Hayden Thomas

The Hon. Samuel R. Aymer

The Hon. Judith Dublin

Chairman

Member

Member

Appearances:

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

Mr. Justin L. Simon, Q.C. for the Employer

2016: November 3

2019: July 24

JUDGMENT

THOMAS, C.

Background

1. The Employer Kenny Gardner operated a business trading as VCNG Clothing Store on Redcliffe Street, St. John's.

2. The Employee was employed by the Employer as a salesman at the Employer's business establishment with effect from October 11, 2008. He worked for \$500.00 per week of six days. The Employee was assisted part time from 2011, by another salesperson, Frederick Walker who is also a teacher by profession. According to the Employer, from time to time the two Employees were left by him "to run and manage the store in his absence".
3. Prior to going on a trip overseas, the Employer on August 31, 2014, took an inventory of the goods in the store in the presence of the two Employees and the Employer's two sons. He travelled on September 1, 2014 and returned on September 16, 2014. The Employee was given the keys for the store and was left in charge during the Employer's absence.
4. On September 17, 2014, the day after the Employer returned, he conducted a second inventory in the presence of the two employees. This was done in order to reconcile sales during his absence. However, before completion, the Employee requested and was given time off to sit a "taxi exam" at Dutchman's Bay but he did not as expected return to the store. He subsequently said that his cell phone battery went dead so that it was difficult for him to communicate.
5. The Employer tried to reach the Employee by telephone several times before and after the close of business on the said date of September 17, 2014 but was only able to make contact about 7:52 p.m. The Employer at the time informed the Employee of discrepancies found in the inventory in an amount of some \$11,223.00 but when told about it the Employee gave no explanation for the loss.
6. The Employee was accused of stealing the goods and was told that the police would have been called to investigate the matter. He was also asked by the Employer to hand over the store keys. The Employer was told that they were left in a vase in the store. According to the Employee's Memorandum, he "interpreted the words and instructions from the Employer as a clear act of dismissal" and that in any event the fact that he was accused of stealing by the Employer would be tantamount to constructive dismissal.
7. The Memorandum further stated that the police subsequently went to the Employee's home and executed a search but that no item belonging to the Employer was found. The police advised the Employee to discuss the matter with

the Employer since he (the Employee) was ultimately responsible for managing the store in the Employer's absence and had to take responsibility for anything missing even if he did not take them.

8. The Employee said that he returned to the Employer's business as advised by the police, on September 19, 2014 and held discussions with his Employer. The Employee "partly took responsibility for some of the purported losses." His co-worker also partly took responsibility. Settlement discussions, however, broke down when the purported loss was said to have been increased by the Employer to \$250,000.00 and the matter was pursued by the Employer with the police. No details were given as to how this amount was arrived at.
9. The Employee claimed that up to October 7, 2014 he did not receive any written statement from his Employer with respect to his employment and therefore sought representation. His representative wrote to the Employer on that date claiming that he was unfairly dismissed.
10. Discussions were subsequently held and the Employer maintained that the Employee stole goods from his store while he was overseas and "would not rest the matter until both employees go to jail for stealing his goods from the store".
11. The Employee also claimed that he was owed vacation for several years but the Employer refused to pay him "because he said that he stole from him and he was not going to give him any money."
12. The Employer, on the other hand, in its Memorandum stated that the Employee has never returned to the store. "He was sent a letter dated October 16, 2014 by registered post advising him that the Employer considered him to have abandoned his job due to his failure to report for duty since September 18, 2014.
13. The letter stated:

"Dear Mr. Lynch:

Upon my return from a two-week family vacation, on September 17th, 2014 you were asked to assist in conducting the inventory so as to compare the sales with the inventory that was taken prior to my leave.

While conducting the inventory it was revealed that there had been a significant shortage to which you agreed. You were asked to offer an explanation for the missing items. You did not offer an explanation.

Frederick was called in and while discussing the matter with him you indicated that you had a test for your Taxi license and that you will come back. However, you never returned. I called you on more than three occasions in the afternoon but that proved futile. When I called you at about 9:00 pm, you answered. I told you that about \$11,000.00 of inventory was missing and how was that possible. Your response was that you did not know. You were told that since you were the one in charge and do not have any explanation for the missing items the matter will be left for the police to investigate. Your response was "do what you have to do". You were then told to bring in the keys for the store. You indicated that you left the keys at the store already.

You have not reported for duty since then, or offered any explanation as to why you could not report for duty.

Having stated the above I am convinced that you no longer have any interest in your job and have concluded that you have abandoned your position at VCNG.

I take this opportunity to wish you all the best in your future endeavors.

Sincerely,

(Sgd.) Kenny Gardner

General Manager, VCNG".

14. A Certificate of Posting for a registered letter at the General Post Office and dated October 17, 2014 was also copied on to the letter.
15. The Employer's Memorandum confirmed that the matter was reported to the police and both employees were later questioned by the police. The police actually searched the Employee's home for the missing items and money but found nothing. Statements were made and recorded and the police charged them with "conspiracy to defraud and with larceny."
16. The Employer denied dismissing the Employee but averred instead that he abandoned his job. The Employer states "that the conduct of the Employee in failing to give a reasonable explanation for the Employer's loss during the period

16. The Employer denied dismissing the Employee but averred instead that he abandoned his job. The Employer states "that the conduct of the Employee in failing to give a reasonable explanation for the Employer's loss during the period when both employees had sole charge of the store, with the Employee acting as the Manager would justify his termination."

Issues

17. The main issues were the following:

- i) Were the inventories taken properly?
- ii) Did the Employee abandon his job as claimed by the Employer?
- iii) Was the Employee constructively or otherwise unfairly dismissed by the Employer as claimed by the Employee?
- iv) If the Employee was unfairly dismissed, what is the level of compensation due to him?
- v) Was the Employee owed for vacation leave?

Legal Parameters

18. Under the caption "Unfair Dismissals", C 56 of the Antigua and Barbuda Labour Code (the Labour Code) states:

"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

19. Section C 58 (1) sets out good cause for dismissal. It states:

"A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2)...

(b) ...

(c) ...

(d) ... 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."

20. Section C 58 (2) states:

"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."

21. Section C 59 (1) makes provision for termination due to misconduct thus:

"An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;*
- (b) committed a criminal offence in the course of his employment, without the consent, express or implied, of the employer; or*
- (c) behaved immorally in the course of his duties."*

The First Issue: Were the inventories taken properly?

22. When asked by the Employer's counsel at the trial how the inventory was taken, the Employee gave evidence that at the first inventory he, Frederick Walker, the Employer and his two sons were each asked to count a section of the store. A list was then compiled. When the Employer returned from overseas, a second inventory was taken. He and the Employee started the inventory but the Employee requested and received permission to leave before its completion in order to go for a test at Dutchman's Bay to obtain a taxi license.

his return from overseas a second inventory was taken on September 17, 2014. It commenced with the Employer and Employee alone but the Employee left before its completion in order to go for a Taxi Exam. The Employer said that at the time there were missing items and most of them were counted in the Employee's presence. According to Counsel for the Employer, "At the time of the Employer's departure, the Employer had registered an \$8,000.00 loss in respect of goods missing for which no cash was recorded as having been received on sale. His total loss amounted to \$11,023.00." He said that he had expected to give the Employee the final inventory but he did not return to work.

24. In his closing submissions, the Employee's representative argued that the Employer did not conduct a proper inventory. He queried, "Having regard to the two (2) inventories conducted by the Employer, can it be reasonably concluded that the Employee would have known what was the exact quantity of items left in the store before the Employer's departure and what items and cash the Employer met on his return?"

25. In our view, one would normally have expected that all the parties concerned would have been present throughout while the inventory was being taken and signed to indicate accuracy of the documents before the handover to the Employee and after the Employer's return. It is noted, however, that the Employee did not at the time query the quantity of items left in the store prior to the Employer's departure and therefore accepted responsibility. It would have also been better if he had remained at the store to fully participate until the end of the second inventory. In short, while there may have been flaws with the taking of the inventories, no issues were raised at the material times and therefore the Employee cannot now evade responsibility. In any event, the Employee did in fact accept some responsibility as indicated in Paragraph 18 of his Witness Statement where he said, "I felt that perhaps I should take some degree of responsibility for any items that might have been indeed missing solely because I was the one left in charge and may not have been altogether vigilant during my employer's absence."

The Second Issue: Did the Employee abandon his job as claimed by the Employer?

26. In the Employer's letter dated October 16, 2014 addressed to the Employee (Paragraph 13 above) the penultimate paragraph stated ".....I am convinced that you no longer have any interest in your job and have concluded that you have

abandoned your position at VCNG.” The Employer’s conclusion was based, according to the letter, on the following reasons:

- a) The Employee did not return to the store after he left on September 17, 2014 to take a test for his taxi license even though he said that he would have gone back.
- b) The Employee was called by the Employer on more than three occasions in the afternoon “but that proved futile”.
- c) The Employer tried again about 9:00 p.m. The Employee then answered and he was told that some \$11,000.00 of inventory was missing and how was that possible, but his response was that he did not know. The Employer then said he would contact the police to investigate the matter and the Employee said “do what you have to do.”
- d) The Employer then asked the Employee to bring in the store keys and was told that they were left at the store. There is no evidence to indicate that the Employer asked the Employee to return to work. Indeed the evidence given by the Employee at the trial was that the Employer said he did not want him there.
- e) The Employer told the Employee that as he had not reported for duty since, or offered any explanation as to why he could not report for duty, he concluded that he had abandoned his job.

27. The Employer gave evidence that the letter referring to job abandonment was sent by registered post on October 17, 2014. However, the Post Office stamp on the envelope indicated that it was returned unclaimed on 19th November, 2014. The Employee said that up to the time of trial he had not received the letter.

28. To summarize, the Employee gave certain explanations as follows:

- a) He was unable to return before the end of the workday and sent a WhatsApp message to Mr. Walker and the Employer’s sons to inform the Employer that he was unable to make it back to work on the afternoon in question. He said that his telephone battery charge was low at the time which affected his communication. The Employer said that he did not receive any message.
- b) The Employer in a telephone conversation informed the Employee of discrepancies in the inventory and the Employee said that he was not aware of discrepancies or how it happened. The Employer,

- b) The Employer in a telephone conversation informed the Employee of discrepancies in the inventory and the Employee said that he was not aware of discrepancies or how it happened. The Employer, however, said that he held the Employee responsible. The Employer was upset and viewed the situation as theft from the store. According to the Employee while on the telephone, he asked the Employer whether he could come to the store to discuss the matter but he said that he did not want the Employee back in his place. The Employer then asked for the keys and decided to report the matter to the police around September 19, 2014. The Employee said that he regarded these as acts of his dismissal. On that same day, the Employee, Mr. Walker and their mothers went to the store to hold discussions concerning the situation. These discussions fell apart and the police subsequently laid charges against the Employee and Mr. Walker but to date there has been no further proceedings on the matter.
- c) The Employee's representative Mr. Carty, wrote a letter to the Employer on October 7, 2014 outlining the sequence of events leading to what he referred to as termination. Clearly, he did not at the time regard the situation as abandonment of the job by the Employee. This issue of termination will be discussed further.

29. After examining the situation in detail we have arrived at the conclusion that the Employee did not abandon his job as claimed by the Employer. Rather, he was terminated because of what was considered to be theft based on the loss of inventory and cash during the period September 1 to 16, 2014 while the Employer was overseas on vacation and left the Employee in charge of the store.

The Third Issue: Was the Employee constructively or otherwise unfairly dismissed by the Employer?

30. Undoubtedly, the Employer terminated the services of the Employee due to what was alleged to be theft by the Employee of inventory and cash during the Employer's absence overseas. This was inferred when the Employer told the Employee that he was not wanted back at the store. The main consideration must now be whether or not in the circumstances this dismissal was unfair.

31. In paragraph 19 above, reference is made to Section C. 58 of the Labour Code which sets out good cause for dismissal and test for measuring same. Reference is also made to Section C. 59 re termination for misconduct or failure to perform duties in a satisfactory manner. The Employee's representative pointed out – and we agree – that there was no due process carried out in that the Employer did not invite the Employee to attend a disciplinary hearing at which the alleged misconduct and evidence of same would have been put to him.
32. It is well known that in our legal system “a man is innocent until he is proven guilty”. One possible alternative course of action by the Employer could have been suspension of the Employee without pay while the matter was being fully investigated or until the criminal court had completed its hearing. It is also noted that the Employer did not fully comply with Section C. 10 of the Labour Code which requires one to furnish the Employee within seven days of termination, a written statement of the precise reason for the termination.
33. Taking all the circumstances of the case into consideration, we conclude that the Employee was unfairly dismissed by the Employer.

The fourth Issue: If the Employee was unfairly dismissed, what is the level of compensation due to him?

34. It is an established principle of this Court that an unfairly dismissed person is awarded compensation under certain specific heads. The Employee's Representative in his written submissions, claimed compensation under Loss of Protection, Notice Pay, Vacation Pay, Immediate Loss, Future Loss, Manner of Dismissal and Exemplary Damages. The claims have been considered and we make the following awards:

Loss of Protection

35. This is similar to severance pay. The Employee worked from October, 2008 to September 2014 i.e. 6 years or 72 months. C 41 of the Labour Code recommends severance pay at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer. His daily wage amounts to \$83.33. Therefore his severance is calculated to be $72 \times \$83.33 = \$5,999.76$.

Immediate Loss

37. The Court sought to determine whether the Employee took adequate steps to mitigate his loss. He mentioned that he was now self-employed, among other things, fixing stereos in his yard. No details were provided of amounts earned. Taking everything into consideration, we have decided that an award of three months wages under this head is reasonable. The Employee's monthly salary amounted to \$2,166.67. Therefore the amount due is $\$2,166.67 \times 3 = \$6,500.01$.

Future Loss

38. We are not satisfied that any award is payable under this head.

Manner of Dismissal

39. We make no award under this head.

Exemplary Damages

40. We are not of the view that any award should be made under this head.

Vacation Pay

41. The Employee in his written and oral evidence testified that since his employment he only received vacation pay for 2 years in respect of 2012 and 2013 respectively and this has not been denied. We therefore award vacation in respect of the other 4 years. It is calculated to be 8 weeks @ \$500.00 per week i.e. a total of \$4,000.00 under this head.

42. The total award amounts to \$16,999.77.

43. We have, however, taken into consideration the admission by the Employee of partial responsibility for some of the Employer's loss bearing in mind that he was left in charge during the Employer's absence. We have also taken into account that the Employee showed little or no interest in the matter when he left while the inventory was being taken according to him to take an exam for a taxi license. That could surely have been re-scheduled. On these bases we have decided to discount the award by 75%. The net award is therefore \$4,249.94.

44. There is no Order with respect to costs.

The amount of \$4,249.94 should be paid by the Employer to the Employee on or before August 30, 2019.

Dated the 24th day of July, 2019.



.....
Dr. Hayden Thomas
Chairman



.....
Samuel Aymer
Member



.....
Judith Dublin
Member

