

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/2 of 2012

BETWEEN:

JACOB JAMES

Employee

And

RUBIS WEST INDIES LTD
(formerly TEXACO WEST INDIES LIMITED)

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Dr. Hayden Thomas

Member

The Hon. Althea Crick (now Deceased)

Member

Appearances:

Mr. Lawrence Daniels of Daniels, Phillips & Associates, Attorneys-at-Law for the
Employee

Mr. Clement E. M. Bird, Attorney-at-Law for the Employer

2014: March 19

2021: June 4

JUDGMENT

Aymer, C:

Background

1. The Employer is a limited liability company organized under the laws of the United Kingdom and duly registered in Antigua and Barbuda as an external company under the Companies Act 1995. It is engaged in the business of supplying fuel to aircrafts at the V. C. Bird International Airport.
2. The Employee commenced his employment with the Employer in 1983 and held the supervisory position of Crew Chief up to February 01, 2006 at which time he was earning a monthly salary of \$9,000.00.



3. On February 01, 2006, the Employee was dismissed on the ground that he was guilty of gross misconduct by misappropriating 11.4 gallons of the Company's diesel from its storage tank on its premises at the VC Bird International Airport.
4. On January 18, 2012, six years after his dismissal, the Employee commenced these proceedings raising the issues of unfair dismissal and entitlement to compensation. In his Memorandum of Claim filed on January 30, 2012, he set out a sequence of events leading up to his suspension by letter dated January 30, 2006 and his dismissal by letter dated February 1, 2006.
5. Ultimately, the Employee contended that:
 - a) It was an implied term of the employment agreement that he would not be unfairly, arbitrarily or summarily dismissed.
 - b) He did not receive all the benefits to which he was entitled at the date of his dismissal.
 - c) The Employer did not follow the correct procedure as established by the Antigua & Barbuda Labour Code (the Labour Code)
 - d) He is entitled to his accrued holiday pay and compensation for his unfair dismissal.
6. By its Memorandum of Defence the Employer disputes the Employee's claim on the following grounds:
 - a) That the Employee was guilty of misconduct in relation to his employment so serious that the Employer could not be reasonably expected to take any course other than dismissal.
 - b) That it acted in accordance with the best industrial relations principles and practices and in complete accord with Section C59 of the Labour Code.
7. Given the Employee's right as established by Section C56 of the Labour Code, the main issue to be determined is whether or not the Employee was unfairly dismissed. In that regard, it is well settled that the evidentiary burden is on the Employer to prove that the dismissal was not unfair.
8. The Employee's evidence is that:

- (a) At about 11:00 p.m. on January 28, 2006 while he was on duty at the Employer's main office, the company's manager arrived at the workplace. Soon after his arrival and after visiting the ramp and the terminal area where some LIAT aircrafts were parked, he had conversations with Franklyn Knowles and another employee. According to the Employee, after those conversations, the manager went to main office and said to him: "I had a complain about you concerning the company's fuel so I am asking you to leave the office and go home pending investigations".
 - (b) On February 01, 2006 the Employee received a letter of suspension dated January 30, 2006 notifying him that he was suspended pending investigations concerning "the unauthorized taking of company diesel". By that letter the Employer undertook to advise him of the outcome of the investigations.
 - (c) On February 03, 2006 the Employee received a letter of termination dated February 01, 2006 whereby his services were terminated with immediate effect. The termination letter stated that the Employee was seen by Janice Constant, a Security Guard, using a hose and water to wash away excess diesel after putting company diesel in his private vehicle which was parked near the pump outside the fence. The letter also stated that the Employer's investigation revealed that the Employee had taken 11.4 gallons of the Employer's diesel without authorization, which he accessed by disconnecting the diesel supply hose from the nozzle.
 - (d) At no time did the Employer ask the Employee any questions regarding any allegations against him; and he never appeared before any tribunal or disciplinary panel; and the matter was never reported to or investigated by the police.
 - (e) The Employer failed to follow the correct procedures as a result of which the Employee was dismissed without a hearing and without being given an opportunity to put his case to the Employer.
9. Mr. Franklyn Knowles, the Employer's Crewman gave evidence on behalf of the Employer. He testified that on Saturday 28th January, 2006 he was on duty at the airport. The Employee and the Security Officer were the only other persons on site. Around 10.30 p.m. the Employer's Superintendent, Mr. Hubert Joseph, drove up to the ramp as he was servicing a LIAT flight and asked him to accompany him to the main compound where they met with Mr. Arlington Thomas, another employee, and the security officer.

10. Mr. Knowles further testified that he saw that the valve which was still locked in place was disconnected from the hose which was on the ground along with spilt diesel. In addition, Mr. Knowles testified that when Mr. Joseph questioned the Employee about the disconnected hose, the spilt diesel and the reading of the fuel tank meter, he denied any knowledge of the situation and refused to go outside of the office to view the state of affairs, whereupon he was told to leave the premises.
11. Mr. Hubert Joseph, Aviation Superintendent, also testified on behalf of the Employer. He stated that on January 28, 2006, while at home, he received a telephone call from Ms. Janice Constant, the Security Officer, informing him that she had seen the Employee filling his bus with the Employer's diesel. Upon receiving the report, he went to the Employer's premises where he could smell diesel some 300-400 yards away from where it was spilt on the ground. He also stated that he saw the Employee's bus parked alongside and on the outside the perimeter fence in close proximity to the diesel tank. He stated that he observed the hose on the ground near the bus with a considerable amount of diesel on the ground.
12. Further, Mr. Joseph testified that the nozzle was separated from the hose while remaining secured to the pump. The water hose was stretched out on the ground towards the fence and was not stored in the customary manner coiled by the pipe. After having been informed by the Employee that the other person on duty that evening was Mr. Franklyn Knowles, he then invited Mr. Knowles to come to the compound. Mr. Joseph continued, that after he pointed out the state of the compound to Mr. Knowles and Mr. Arlington Thomas, whom he had called out, he confronted the Employee and asked him what he had to say but the Employee denied any knowledge and asserted that no one was going to run him from his job.
13. Finally, Mr. Joseph testified that he noticed that the diesel tank was showing 11.4 gallons of diesel extracted. When the Employee rejected his invitation to go outside and view the state of the compound, he suspended the Employee who was later dismissed for stealing the diesel.

Discussion

14. In his closing submissions, on behalf of the Employee, Mr. Daniels underscored the Employee's brief evidence in chief. Perhaps most importantly, he

highlighted the Employee's responses to opposing Counsel during cross examination, the main points of which are:

- (a) Apart from stating that he had received a call that the Employee was seen taking fuel, and asking him to leave the premises, Mr. Joseph did not say anything else to him. In particular, Mr. Joseph did not tell him that he was seen stealing diesel and that he had observed that the hose had been tampered with.
- (b) When it was put to him that he could not deny that the hose had been tampered with, the Employee responded that he had never seen it. Further, when it was similarly put to him that he could not deny that 11.4 gallons of fuel were removed, the Employee similarly replied that he had never seen that and only became aware of that allegation when he received the termination letter.

15. As to the Employer's evidence, we also note Mr. Daniels recollection of Mr. Joseph's testimony. Under cross examination, he testified that he did not think it was necessary for Ms. Constant to repeat her allegation in the presence of the Employee. As to why he did not report the alleged theft to the police, Mr. Joseph testified that it was premature to do so, "it was midnight" and he needed instructions from his superiors to do so. Further, he was not aware whether the matter had been investigated and that he had seen no report on it.
16. As to Mr. Knowles evidence, according to Counsel, he testified that the Employee denied taking the diesel. In relation to the conversation between Mr. Joseph and the Employee, Mr. Knowles further testified that the Security Officer who made the allegation was in the yard at that time.
17. We have noted Mr. Daniels submission with reference to the dismissal letter that there is no evidence that any investigations were conducted. No report was provided and no investigating officer was called as a witness. Moreover, we note Counsel's assertion that no investigation was undertaken and no one interviewed the Employee.
18. We are inclined to accept Counsel's submission that there was a breach of natural justice in that no investigations were undertaken by the Employer; no specific allegations were put to the Employee; and he was given no opportunity to defend himself. We are further inclined to agree with Mr. Daniels that the dismissal was contrary to good industrial relations practices in Antigua & Barbuda.

19. In his closing submissions on behalf of the Employer, Learned Counsel, Mr. Bird quoted the relevant parts of Sections C58 and C59 of the Labour Code. Ultimately, the nub of his contentions is that the Employer has established theft by the Employee as the form of misconduct providing a valid reason for his dismissal. Moreover, he submitted that the Employer has passed the test of reasonableness to the extent that the employment relationship could not reasonably be expected to continue.
20. In advancing his submissions, Counsel underscored the “standards” laid down by the statutory provisions. He cited several judgments of this Court, including **Craig Joseph v Diamonds International**: Reference No. 17 of 2007; **Joshua Fabian v The Bank of Nova Scotia**: Reference No. 6 of 2004; and **Trevor Romeo v The Epicurean Limited**: Reference No. 8 of 2009 in support of his main submissions that:
- (a) It was reasonable for the Employer to conclude that the Employee did in fact steal 11.4 gallons of its diesel fuel based on the physical evidence and in the absence of any alternative explanation.
 - (b) The requirements of natural justice were satisfied in that the Employer carried out a sufficient investigation and afforded the Employee sufficient opportunity to defend himself.
 - (c) The summary dismissal of the Employee was justified in the circumstances having regard to his fiduciary relationship with the Employer.
21. Learned Counsel maintained that, by reason of his fiduciary duty, the Employer was entitled to dismiss the Employee because it reasonably concluded that he had stolen its diesel.
22. From our perspective, we could only conclude that the Employee was not unfairly dismissed if, and only if, the Employer fully discharged its evidentiary burden at the trial to prove that it acted reasonably.
23. Under section C 58 of the Labour Code there is no doubt that the theft of an employer’s property may be a sound basis for summary dismissal provided always that the Employer proves as matters of fact that (a) the employee stole the employer’s property, and (b) it acted reasonably.
24. Learned Counsel submitted that we should accept the circumstantial and hearsay evidence and draw appropriate inferences from the Employee’s rejection of Mr. Joseph’s invitation to view the physical evidence of tampering and his failure to explain the state of affairs. On the other hand, we are obliged to note

the Employee's denial of any wrong-doing, his assertion that he was innocent and his warning to Mr. Joseph that he should be careful with what he was doing.

25. In light of the circumstantial and hearsay evidence, it is particularly noteworthy that the only alleged eye-witness, Ms. Constant, the Security Officer who reportedly witnessed the Employee in the act of stealing the diesel, was not called as a witness for the Employer although she was initially listed as such. As a result, we were deprived of potentially useful evidence to assist with our findings of fact.
26. The nature and extent of the evidence underscores the paramountcy of the test of reasonableness laid down in section C 58 (2) of the Labour Code. In that regard, Counsel's reference to the principles of natural justice must be considered in the context of section 10 (3) of the Industrial Court Act. Not only are we required to have regard for the provisions of the Labour Code, we must consider whether the Employer acted in accordance with the principles and practices of good industrial relations.
27. As to those principles and practices, suffice it to say, each employee who is accused of misconduct is entitled:
 - a) To know, preferably in writing, the precise allegations against him;
 - b) To be given a fair hearing, including the opportunity to confront his accusers and state his defence.
28. The factual situation and surrounding circumstances leading to the Employee's dismissal made it critical for the Employer to carry out a full and proper investigation.
29. Although in the letter of suspension the Employer expressly notified the Employee of its intention to carry out an investigation, no evidence of the same was adduced at the trial. Moreover, in light of her absence as a witness, there was no disclosure of any written statement or report made or given by Ms. Constant about the Employee's alleged theft of the diesel.
30. In any event, based on the evidence or lack thereof, we find that no or no proper investigation was carried out; the Employee was given no or no proper particulars of what was alleged against him, and there was no hearing at which the Employee was given an opportunity to defend himself.
31. The significance of procedural fairness as a component of reasonableness is demonstrated in the case of **Michael Blackburn v. LIAT (1974) Ltd**, Ref. No. 54

of 2013. In its judgment, this Court found that the employee was guilty of misconduct which could have potentially justified his summary dismissal. That finding was grounded on direct oral evidence of the employee making offensive statements about the Employer, its management team generally and one of its senior managers in particular.

32. Further, in the **Blackburn case**, the Court found that the employer deprived the employee of “the opportunity to exculpate himself” before taking disciplinary action against him. Finally, the Court applied the test of reasonableness and reminded itself that the denial of a fair procedure does not always lead to a finding of unfair dismissal. In the end, it was held that Blackburn was unfairly dismissed because he “was dismissed in blatant contradiction of the rules of natural justice and in breach of the principles of good industrial relations”.
33. Notwithstanding that finding, it was further held that, by reason of his misconduct, Mr. Blackburn had contributed to his dismissal to the tune of 65%. That judgment was upheld on appeal to the Privy Council.
34. Given the outcome in the Blackburn case, we are mindful that each case turns on its own peculiar facts and that in civil cases, determination is on the balance of probability. On the facts of this case, the Employer failed to discharge its burden of eliciting sufficient cogent and weighty evidence to meet the required standard. As pointed out by Learned Counsel, Mr. Daniels,, “mere suspicion is not evidence”.
35. In the premises, we find as follows:
 - a) In the absence of testimony from Ms. Constant, the Security Officer, the circumstantial and hearsay evidence supporting the allegation of theft made against the Employee was insufficient to prove that he is guilty of misconduct. In effect, the Employer failed to discharge its evidentiary burden of establishing the required factual basis in accordance with section C 58 (1) of the Labour Code.
 - b) In any event, it is our considered opinion that by reason of its breach of the principles of natural justice and the principles and practices of good industrial relations, the Employer acted unreasonably in dismissing the Employee. In effect, the Employer has failed the test of reasonableness established by section c 58 (2) of the Labour Code.

36. Those findings constrain us to declare that the Employee was unfairly dismissed and is entitled to compensation.
37. However, our mandate under section 10 (3) of the Industrial Court Act requires us to “act in accordance with equity, good conscience and the substantial merits of the case” before us. Ultimately, we are required to make an award which we consider to be “fair and just”. To that end, we will consider whether the Employee is blameworthy and effectively contributed to his unfair dismissal. It is in this regard that we find Mr. Bird’s submission regarding the fiduciary relationship between the parties most persuasive.
38. Needless to say, in coming to our conclusion of unfair dismissal, we considered all the facts and circumstances including the nature of the Employer’s business and the position held by the Employee. At trial, the Employee admitted that he “was in charge of the [Employer’s] compound [at the V. C. Bird International Airport] for that night”. This is a significant fact.
39. As pointed out by Learned Counsel, in the **Craig Joseph case** this Court has previously affirmed the existence of a fiduciary relationship of trust and confidence between an employer and his employee. That relationship was expressed by Lord Jauncy in **Neary v Dean of Westminster (1999) I.R.L.R.288** as follows:
- “It has long been recognized that there exists between master and servant a fiduciary relationship of trust and confidence”.**
40. There are several terms implied by law in every contract of employment. These include one for mutual trust and confidence. In addition, each employee has an obligation to exercise reasonable skill, care and competence in discharging his responsibilities and duties. Further, the implied terms include one imposing an obligation on each employee to cooperate with his employer in safeguarding and accounting for the latter’s property.
41. On the evidence before us, we conclude that, being “in charge” in his capacity as Crew Chief, the Employee was in breach of several of the terms implied in his contract of employment. These terms imposed duties and responsibilities on the Employee, the breach of which were manifested in several ways. including:
- (a) His apparent wanton disregard for and disinterest in the preservation of the Employer’s property;
 - (b) His failure to exercise reasonable care of and account for the Employer’s property under his direct control;

- (c) His refusal to cooperate with his superior Mr. Joseph, the Aviation Superintendent, in an examination of and inquiry into the state of affairs;

42. As a result, we find that the Employee is blameworthy and contributed significantly to his unfair dismissal. For present purposes, we apportion the extent of his contribution to be 90%.

43. Subject to an equivalent reduction on the basis of his contribution, we assess the Employee's entitlement to compensation as follows:

a) Payment in Lieu of Notice

The equivalent of 1 month's pay \$ 9,000.00

b) Loss of Protection Against Unfair Dismissal

The equivalent of 1 month's pay per year for 23 years 207,000.00

c) Pay in lieu of Accrued Vacation

Payment conceded by the Employer 4,500.00

Total \$ 220,500.00

44. In the circumstances, the Employee is entitled to the sum of \$21,600.00 being 10% of \$216,000.00, the amount assessed under paragraph 43 (a) and (b) above, plus \$4,500.00 the amount conceded by the Employer. Accordingly, we order:

- 1) The Employer shall pay to the Employee the total sum of \$26,100.00 on or before June 30, 2021 as compensation for his unfair dismissal.
- 2) There shall be no order as to costs.

Dated this 04th day of June, 2021.


.....
Samuel Aymer
Chairman


.....
Hayden Thomas
Member

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Employer

JUDGMENT

Hon. Samuel Aymer, Chairman
Hon. Dr. Hayden Thomas, Member
Hon. Althea Crick, Member (Now Deceased)