

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO C/53 OF 2016

BETWEEN:

SHEMIQUE BURTON

Employee

and

JUMBY BAY RESORT LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John Benjamin

Member

Appearances:

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

Ms. Fiona Murphy of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2017: November 28

2021: December 8

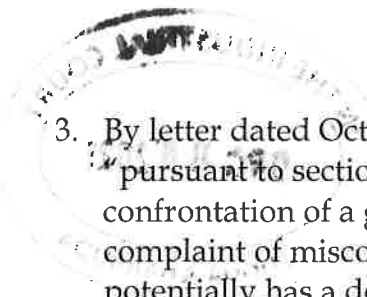
JUDGMENT

Brown, P:

Background

1. At all material times, the Employer was a company registered in Antigua and Barbuda and conducting business as Jumby Bay Resort, a five-star resort, on Long Island just off the northeast coast of Antigua.
2. The Employee was employed as a Room Attendant for approximately six (6) years from November 19, 2009, until October 14, 2015, when she was dismissed. At the latter date, in addition to her salary of \$444.00 per week, she received the sum of \$1,410.08 per fortnight as her share of the Employer's revolving Service Charge Fund.



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3. By letter dated October 14, 2015, the Employer dismissed the Employee pursuant to section C 59 (2) of the Antigua Labour Code, in that [her] confrontation of a guest in the manner [she] did on 13 August regarding a complaint of misconduct which exposed the resort to reputational risks and potentially has a detrimental effect on the employer's business interest".
 4. By the Reference filed herein on September 6, 2017, the Employee claims that she was unfairly dismissed and is entitled to compensation. To the contrary, the Employer contends that the Employee was not fairly dismissed and is not entitled to any relief.

The Opposing Positions

5. The Employee's claim is grounded as follows:
 - (a) By letter dated May 12, 2015, the Employee was issued a written warning in accordance with Clause 26 (10) of the Collective Agreement between the Employer and the Employee's bargaining agent, the Antigua and Barbuda Workers' Union. The offence complained of was based on a guest complaint and involved the Employee's entry into the guest's room and cleaning it for an expected future guest while the occupying guest was still present. In the letter the Employer describes the Employee's action as "This conduct"
 - (b) The relevant offence fell in the category of: **"Actions which result in complaints from guests, suppliers, or manufacturers affecting the company's reputation or business."** By that letter, the Employee was warned that further disciplinary action, including suspension or dismissal, would be taken against her if she committed another offence of similar gravity.
 - (c) Based on a fresh guest complaint, the Employee was issued with a further warning by letter dated August 14, 2015. This letter related to the Employee's failure to service the room of a guest's daughter. In it, the Employer referred to its performance appraisal for 2015 and concluded that the Employee's work performance had not improved. The Employer expressed its concerns as follows: **"Management is quite concerned about your level of performance as not only are you eroding our confidence in your ability, but we are also concerned about the impact of your substandard performance is having that could potentially create huge reputational damage to the resort."**
 - (d) In the latter letter, the Employer also found that the Employee was guilty of insubordination as she had failed to follow the instructions given by her superior.
 - (e) Without referring to the earlier warning, the Employer also expressed its expectation of a "significant and sustained improvement in [the Employee's]

performance. As in the earlier instance, the Employee was warned that if there was no improvement or if there was a repeat of the same offence, disciplinary action in the form of suspension or dismissal would be taken against her depending on the seriousness of the "offence" or "misconduct".

- (f) By letter dated October 7, 2015, the Employee was suspended for five days pending investigations into her interaction with the guest after the complaint referred to at paragraph (c) above.
 - (g) By letter dated October 14, 2015, the Employee was dismissed in relation to the "complaint which the resort received from a guest on 16 August 2015 ...after the guest had checked out on 14 August 2015".
 - (h) According to the guest's complaint, on 13 August 2015, the Employee "came in and started an argument about our complaint [saying]: 'so I hear you're unhappy about our cleaning' and began a tirade about shift work. This was out of order. I had to defensively explain that we had only complained that the room had not been serviced at all, and was nothing to do with the quality of the cleaning staff's work" [our emphasis]
 - (i) The offence for which she was dismissed was not similar to the one for which the Employee had been warned.
 - (j) The Employee was denied natural justice because she was not given the opportunity to confront and challenge her accusers in respect of what had been alleged against her.
 - (k) After dismissing her, the Employer took deliberate steps to prevent her from finding alternative employment.
6. On the other hand, the Employer disputes the Employee's claim on the following grounds:
- (a) The Employee was aware of all relevant policies and procedures observed and practiced by the housekeeping department.
 - (b) The Employee was also aware that guests could provide feedback and make complaints about their experience using a survey platform established by the Employer.
 - (c) In the written warnings issued to the Employee on May 12, 2015 and August 14, 2015 the Employee was warned of termination if she were to repeat the same or similar breach.
 - (d) On August 16, 2015, the Employer on its platform received a third complaint that the Employee had started an argument with the guests in relation to the earlier complaint about which the Employee had been warned on August 14, 2015.
 - (e) The dismissal of the Employee on October 14, 2015 followed an investigation, during which the Employee admitted to having a conversation with the guest about her earlier complaint. Based on that admission, the Employer deemed

the actions of the Employee tantamount to misconduct sufficient to justify her dismissal.

- (f) In the circumstances, the Employee was not unfairly dismissed and is not entitled to any compensation over and above her outstanding vacation pay, two weeks' notice pay, severance, and wages up to October 14, 2015, all of which she had received.
 - (g) The Employer did not take any steps to prevent the Employee from gaining alternative employment save for reminding a private homeowner of the established policy requiring him to get clearance from the Employer before hiring new staff.
7. Given the foregoing factual matrix, the main issue arising for our determination is whether the Employee was unfairly dismissed, the resolution of which turns largely on whether she was denied natural justice during the investigation and hearing procedures conducted by the Employer.

Resolution

8. Section C 56 of the Antigua and Barbuda Labour Code (The Labour Code) establishes the statutory right of an employee not to be unfairly dismissed. The determination of whether a dismissal is unfair is governed by section C 58. Firstly, a dismissal will not be unfair if the Employer establishes a factual basis for a valid assigned reason such as misconduct. If that threshold is met, the Employer must then, in addition, go on to pass the statutory test of reasonableness as established by section C 58 (2), by proving that it acted reasonably in dismissing the Employee.
9. Section C 59 (1) empowers an employer to lawfully dismiss an employee who is guilty of misconduct. However, subsection (2) of that section proscribes the action open to the employer if the misconduct is not serious enough to warrant dismissal in the following terms:

"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 which 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."

10. Given the factual matrix and the law outlined above, we are mindful of the Employer's stated reason for the dismissal as expressed in the dismissal letter dated October 14, 2015:

"In the circumstances you are advised that your employment with the resort is terminated immediately pursuant to C 59(2) of the Antigua Labour Code, in that your confrontation of a guest in the manner in which you did on 13th August regarding a complaint in misconduct which exposed the resort to reputational risk and potentially has a detrimental effect on the employer's business interest. This misconduct being a repetition of similar misconduct is of so serious a nature that it clearly demonstrates to the employer that the employment relationship cannot reasonably be expected to continue".

11. In relation to the alleged denial of natural justice, the Employee asserts that she was not identified in the complaint which led to her dismissal. Further, she contends that she was given no opportunity to confront her accusers. In response, the Employer says that the complaint from the guest, like on all previous occasions was presented to the Employee, and she was given an opportunity to respond to the allegations.
12. It is well settled 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 hearing would make no difference. Similarly, the fact that the Employee may not have an opportunity to be heard in the presence of his accusers and to cross-examine his accuser does not in each circumstance lead to the conclusion that the dismissal was unfair.
13. In this case, the employment of the Employee was terminated on the ground of "misconduct". Her termination came after an investigation by the Employer, which led to a reasonable suspicion on its part of the guilt of the Employee. The Employer relied on several aspects of the Employee's response, including the fact that she did not deny speaking to the guest at the material time. Moreover, the Employer relied on the fact that the Employee never disputed that she was on duty and assigned to that particular guest's room at the material time.
14. In considering the evidence, we are mindful that the nature and high rating of the Employer's business, it would have been undesirably awkward to have the Employee confront the guest about her complaint and subject her to the rigours of a potentially confrontational exchange with the Employee at a disciplinary hearing.

15. Be that as it may, we are left to determine whether the Employee's admission of having the conversation was sufficient to ground the conclusion of her guilt. In our view, it would be necessary to make findings of fact regarding what was said to the guest and the tone and manner in which the conversation occurred. We note the Employer's evidence that the guest did not submit a written report of the incident at the time she was in occupation.
16. Further, we note that the incident occurred on August 11, 2015, the oral complaint on the ground was made on August 13, the written warning was issued on August 14, 2015, and the further virtual complaint was made on August 16, 2015. Further, we also note that the dismissal under section C 59 (2), largely grounded on the factual basis of the last complaint, was not effected until October 14, 2015. In that regard, the Employee admitted to the conversation with the guest on August 13, 2015. Her explanation differs from the Employer's account which, necessarily, must have been based on the guest's complaint. Importantly, the Employee denies that the conversation was confrontational. According to her, she was merely apologizing to the guest.
17. Given its reliance on section C 59 (2) there is no doubt that in order to prove that the dismissal was not unfair, the Employer would have to establish on the balance of probabilities that the Employee's conduct in relation to the last complaint on August 16, 2015, was a repetition of the earlier misconduct. In the letter dated August 14, 2015, she was warned of either suspension or dismissal for continuing poor performance or insubordination.
18. In the circumstances, at October 7, 2015, when the Employee was suspended pending investigation, the Employer had an obligation to involve the Employee in the investigatory process and establish therefrom that there was a repetition of the misconduct which was earlier complained of.
19. There is no doubt that at the date of suspension there was a serious dispute regarding the facts in relation to the Employee's conduct in response to the latest virtual guest complaint. However, according to the Human Resource Manager, Marcia Brown Kelly, the investigation revealed that the Employee was the one who confronted the guest, and it was that confrontation that led to the posting of the complaint.
20. In our estimation, given that the complaint was made several days after the guest left the Resort, the Employer did not do enough to ascertain the actual exchange of words between the guest and the Employee as might have been overheard by the gardener then on duty. In light of the explanation given by the Employee, there was simply not enough to conclude that she was guilty of a repetition of the conduct for which she had been earlier warned. Such a

conclusion should have been reached only if the Employer had reasonably found that the Employee had in fact been confrontational; that she engaged in a tirade; and that she was "out of order". In our opinion, it was not reasonable for the Employer to come to that conclusion.

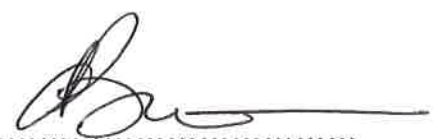
21. In our view, the Employer's conclusion might have been different had it communicated with the guest via email indicating what the Employee had said. The guest could then have been invited to respond to the Employee's submission and the contents shared with the Employee. Additionally, in our view, the Employer ought to have interviewed the gardener to ascertain whether he overheard the conversation between the guest and the Employee.
22. In our view, given that the Employee was warned about the possible outcome of suspension or dismissal, dismissal was not within the band of reasonable actions which a reasonable employer should have taken in the circumstances. In the final analysis, the Employer has failed the statutory test of reasonableness with the result that the dismissal was unfair and the Employee is entitled to compensation.

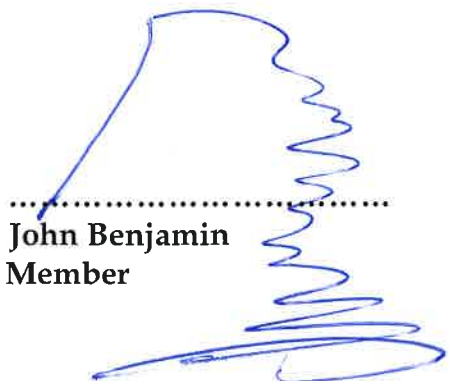
Compensation

23. In the normal course of things, our assessment of compensation would include awards for Notice Pay and Loss of Protection from Unfair Dismissal, payments for which were made to the Employee at the time of her dismissal. She also received payment in lieu of accrued vacation. In the circumstances, we are left to assess compensation, if any, under the other customary headings.
24. Before proceeding with the required assessment, we note that, having regard to the evidence as a whole, we find that the Employee is blameworthy. In that regard, we apportion her contribution to her dismissal to be 20%. The amounts we assess below will be discounted accordingly.
25. Although her evidence regarding her efforts to find alternative employment is sketchy, we find that the Employee made reasonable efforts only during the three months immediately after her dismissal. Accordingly, **we award the sum of \$5,772.00**, being the equivalent of her full basic salary for three months, under the heading Immediate Loss.
26. As to Fringe Benefits, it is common ground that the Employee earned a share of the Employer's service charge fund. Under this heading, **we award the sum of \$9,165.52** as the loss suffered by the Employee over the said three-month period.

27. For completeness, we have considered the Employee's contentions regarding the Employer's interference with her job prospects on Jumby Bay Island. Suffice it to say, we have no or no sufficient evidence on the basis of which we could find that the Employer engaged in any restraint of trade. We accept the Employer's contention that it was necessary to implement appropriate policies to safeguard its business and assets as well as those of other businesses and private homeowners on the island.
28. By reason of the matters aforesaid, we declare that the Employee was unfairly dismissed and is entitled to compensation in the sum \$14,937.52. We discount that sum by \$2,986.90 so that the Employee is entitled to receive the net sum \$11,950.02, being 80% of the total amount assessed above.
29. And we order that the Employer do pay to the Employee the sum of \$11,947.62, as outstanding compensation due and payable to her for her unfair dismissal, no later than December 31, 2021.

Dated this  day of December 2021


.....
Charlesworth O.D. Brown
President


.....
John Benjamin
Member

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