

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT



REFERENCE NO.C/ 61 of 2016

BETWEEN:

GILDA WILLIAMS

Employee

And

GALLEY BAY INVESTMENT LIMITED
trading as
GALLEY BAY RESORT & SPA

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

Mrs. Stacey-Ann Saunders-Osborne of Saunders Osborne Legal Services, Attorneys-
at-Law for the Employer

2017: November 30
2021: December 8

JUDGMENT

Brown, P:

Background Facts

1. The Employer is a registered company carrying on the business of hoteliers at its premises at Galley Bay in the Parish of St. John in Antigua & Barbuda.
2. The Employee commenced her employment with the Employer as a Receptionist on November 22, 2004. Up to the date of her dismissal on February 18, 2016 she was earning a salary of \$456.00 per week. In addition, she also earned a variable

amount as her two-point share of the service charge fund averaging \$375.00 per week.

3. The employment relationship between the parties was largely governed by the Labour Code and the Collective Agreement dated March 20, 2015, then in force between the Antigua and Barbuda Workers' Union and Elite Antigua Resorts, a group of resorts of which the Employer is a member. Article 26 of the Collective Agreement provides for disciplinary procedures applicable to the administration of the Disciplinary Code as set out in its attached Appendix 1. Under item 26.5.23 of the Disciplinary Code, the penalty for "Pilferage (unauthorized removal, storage, transfer, utilization) of hotel, guest or employee property" is Dismissal. The band of offences in which Pilferage falls is as follows:

"26.5.20	Fighting or attempting bodily injuring to another person	
26.5.21	Taking hotel property, machinery or equipment off hotel premises without permission	
26.5.22	Using obscene language in the hearing of guests	
26.5.23	Pilferage (unauthorized removal, storage transfer, utilization) of hotel, guest or employee property	} Dismissal
26.5.24	Intentional damage to hotel property	
26.5.25	Immoral or indecent behavior or aiding and/or abetting such behavior"	

4. Article 26.1 of the Collective Agreement provides that:

"It is agreed that the employer has the right to discipline employees for misconduct as set out in Appendix 1. Notwithstanding, however, it is understood that each situation... shall be considered on the overall merit and the appropriate disciplinary action will be taken, which may not necessarily be in the order of progression as set out in the disciplinary Appendix herein".

5. The spectrum of infractions and the corresponding disciplinary actions which the Employer would be entitled to take include a reprimand, warning, suspension and dismissal. Under the subhead "Discipline definitions" Article 26.6.3 defines suspension as follows. Suspension means:

"Suspension from work without pay. Where the employer has the right to dismiss an employee, he may, instead of dismissing the employee, suspend him for a period."

Unfair Dismissal and the Burden of Proof

6. Based on her statutory right as established by Section C56 of the Antigua & Barbuda Labour Code (the Labour Code), the Employee contends that she was unfairly dismissed and is entitled to compensation therefor.
7. Given her statutory right, having raised the issue of unfair dismissal in this Reference, the onus is on the Employer to prove that the dismissal was not unfair. To that end, the Employer must prove that: (a) It had just cause for the dismissal under section C58 (1) of the Labour Code, and (b) it acted reasonably in dismissing the Employee in the particular circumstances prevailing at the material time.

Overview of the opposing cases

8. On the one hand, in reliance on her Memorandum of Claim, as supported by her oral and written testimony, the Employee claims that she was unfairly dismissed and is entitled to compensation. Her contentions may be summarized as follows:
 - (a) The Employee worked faithfully for the entire 11 year period of her employment, during which no disciplinary action was taken against her.
 - (b) As a devout Seventh Day Adventist, she does not consume coffee.
 - (c) On February 16, 2016, she requested that Ms. Joan Henry, Housekeeping Supervisor, deliver some tea bags to her workstation.
 - (d) Ms. Henry delivered a small plastic bag, with the opening tied shut, containing sachets of coffee.
 - (e) The Employee never untied the bag and looked at its contents but was under the impression that it contained tea bags and not sachets of coffee.
 - (f) She kept the tied bag in her possession until the end of her shift at 11:00 p.m., at which time she absent-mindedly placed it in her handbag when she hastily went to the security checkpoint at the exit gate.
 - (g) On arriving at the checkpoint, Mr. Bryan, the Security Manager, demanded that the Employee leave the bag, which was delivered to her by Ms. Henry. It was at that point she ripped open the bag and discovered that it contained the sachets of coffee.
 - (h) Mr. Bryan, being one of the Employer's Senior Executive Managers decided to give her a "break", warned her, and threatened to suspend her if it happened again.
 - (i) Having discerned that Mr. Bryan had formed the view that she was attempting to steal the coffee, the Employee called him to explain her position. Mr. Bryan declined to discuss the matter with her except to state that the bag contained "35 packs" of coffee.

- (j) Being concerned about the position taken by Mr. Bryan and his refusal to listen to her explanation, the Employee telephoned Ms. Henry and enquired as to what she had placed in the bag. Ms. Henry responded that she had put in "a handful" of packets of coffee.
 - (k) The following day, the Employee was summoned to a "disciplinary meeting" at which Mr. De Brito, the General Manager, produced a plastic bag which was much larger than the one she received from Ms. Henry. Mr. De Brito maintained that that was the bag containing the 35 packs of coffee.
 - (l) At the meeting, the Employee denied that the bag in Mr. De Brito's possession was the one given to her by Ms. Henry. In addition, she asserted that Mr. Bryan did not count the packs of coffee in her presence.
 - (m) Further, the Employee requested that both Ms. Henry and Cpl. Francis, a Security Officer, be called in her presence to clarify the matter.
 - (n) The Employee also asserted that Mr. Bryan had taken the decision to merely reprimand her with a warning and not take any more severe disciplinary action against her.
 - (o) The General Manager refused to summon Ms. Henry and/or Mr. Francis so that she could confront them about the allegations against her.
 - (p) By letter dated February 19, 2016, the Employee was unfairly dismissed.
9. On the other hand, the Employer disputes the Employee's claim on the following grounds:
- (a) On February 16, 2016, the Employee specifically requested coffee from Ms. Henry who put a handful of packs in a plastic bag and tied it.
 - (b) An unnamed whistle-blower spoke to Mr. Bryan as a result of which he requested that the Employee take the Employer's property from her handbag. When the Employee ripped open the plastic bag the packs of coffee were revealed.
 - (c) The Employee attempted to blame Ms. Henry and stated that she did not know why she gave her so many packs.
 - (d) After the Employee left the premises, Ms. Fullwood, the Security Shift Leader, counted 29 packs of coffee and placed them in a large plastic bag and left them at the security checkpoint
 - (e) Both Mr. Bryan and Ms. Fullwood prepared reports on the matter and notified the Employer about the matter.
 - (f) Mr. Bryan did not give the Employee a break as he had no authority to do so.
 - (g) The Employee did attempt to explain herself to Mr. Bryan but he did not prolong the conversation.
 - (h) The Employer followed good industrial relations practices and conducted an investigation in accordance with the Collective Agreement. Meetings were conducted with Ms. Henry, Mr. Ryan, Ms. Fullwood and Corporal Francis.

- (i) On February 17, 2016, the Employee was called to a disciplinary meeting, informed of the evidence against her and given an opportunity to explain herself.
- (j) The Employee considered all the facts, the Collective Agreement and the Labour Code in making its decision to dismiss the Employee by letter dated February 19, 2016, on the ground that she was guilty of pilfering as defined under clause 26.5.23 of the Collective Agreement.
- (k) The Employee was not unfairly dismissed.

Resolution

- 10. In accordance with the Labour Code generally and the Disciplinary Code of the Collective Agreement, in particular, there is no doubt that the possession by the Employee of the Employer's property among her personal items when leaving the Employer's premises is potentially a good cause for her dismissal. As a result, the resolution of the main issue as to whether the Employee was unfairly dismissed will turn on the reasonableness of the Employer's actions in the circumstances.
- 11. Although no evidence was given as to the value of the packs of coffee, we nevertheless have to consider the actions of the parties in the proper context. It is not in dispute that the Employee had worked faithfully for over 11 years and was entitled to consume complimentary beverages, as a fringe benefit, on the premises during the course of her employment. No evidence was adduced at trial of any particular procedure which had to be followed for access to such beverages.
- 12. It appears that Ms. Henry was free to deliver packs of coffee or tea to employees from time to time. Similarly, the evidence of both parties is on common ground that Mr. Bryan was authorized to allow the Employee to take a cup of hot chocolate from the vending machine, which is usually reserved for guests. Moreover, it is also common ground that Ms. Henry openly delivered the plastic bag with the packs of coffee in the presence of Mr. Bryan.
- 13. Thus, we conclude that a cup of coffee or hot chocolate or tea is a common benefit which all employees enjoyed on the job from time to time. In our estimation, the possession of a pack or a cup of coffee or tea or chocolate would not by itself be considered pilferage and render an employee liable for dismissal either under the Labour Code or under clause 26.5.23 of the Disciplinary Code. Further, it would not be unreasonable for Mr. Bryan, Ms. Fullwood or any other Senior Security Officer to exercise his discretion and warn any employee found with any of these items if a pack or cup of coffee or tea or chocolate was among

their personal belongings when leaving the premises after their shift ended at 11:00 p.m.

14. We find the Employee to be a reliable witness. We accept her evidence that by reason of her denominational faith she did not consume coffee. In addition, we accept her testimony she did not untie or open the plastic bag containing the packs of coffee when it was delivered to her. In the circumstances, we find that the number of packs in Ms. Henry's handful was probably far less than 35 or 29 as the Employer would have us believe. Further, it is clear that the larger bag, which Mr. De Brito showed to the Employee during the disciplinary hearing, was not the one delivered to the Employee by Ms. Henry. In our view, the Employee was truthful when she said that after he confiscated the coffee, Mr. Bryan directed that they be kept with other bags of coffee at the checkpoint.
15. We also accept the Employee's testimony that she inadvertently placed the tied plastic bags among her personal items; that she was not mindful that the packs of coffee were in her possession when she was at the checkpoint; that she was genuinely surprised that the bag given to her by Ms. Henry contained packs of coffee; that she explained her inadvertence to Mr. Bryan and apologized for the same. There is no evidence that either Ms. Fullwood or Mr. Bryan counted the number of packs in the presence of the Employee. In addition, the evidence which we accept discloses that the bag which was delivered to the Employee and torn by her to reveal the coffee packs was not preserved.
16. At the end of the day, the key question that emerges is: what would a reasonable employer do in response to the state of affairs? Subject always to the Employer's discharge of its obligation to carry out a full and proper investigation, dismissing the Employee would potentially be one of several actions within a band of reasonable responses which a reasonable employer could take. In our view, on the facts of this case, the disciplinary process should have included an opportunity or better opportunity for the Employee to confront her accusers and possibly exculpate herself. The need for a full and proper investigation followed by adequate disciplinary proceedings is at the core of the matter.
17. In our estimation, the Employer did not discharge its obligation to conduct a full and proper investigation. In that regard, we accept the Employee's evidence that, the Employer failed or refused to invite Ms. Henry or Mr. Francis to participate in the investigatory meeting despite her request. Such participation would most likely have assisted the Employer in ascertaining (a) how many packs of coffee were in the Employee's possession (b) the verbal exchange between Ms. Henry and the Employee before the packs of coffee were delivered to the Employee (c) the exchange between Mr. Bryan and Mr. Francis in relation to the Employee.

18. Further, we are mindful of the Employee's contention that she was "set up". In that regard, at the trial, the Employer did not disclose the identity of the alleged whistleblower or call that person as a witness.
19. It is also noteworthy that on 17th February 2016, according to Mr. Bryan, "management held individual meetings with me, Ms. Henry, Ms. Fulwood, Corporal Francis and the Employee". According to Ms. Henry, she was called to a "short meeting" on the 17th February 2016, at which Mr. Bryan was present with the General Manager and the Personnel Officer but not the Employee. Ms. Henry was sent home while the matter was investigated and subsequently called back to work.
20. Moreover, the evidence discloses that soon after the packs of coffee were discovered in her possession, the Employee attempted by telephone to explain her position to Mr. Bryan but he refused to listen. Instead, he expressed his alarm that the Employee had as many as 35 bags of coffee and "hung up the phone on her". Similarly, the Employee contacted Ms. Henry by telephone and unsuccessfully attempted to get clarification from Ms. Henry about how many packs of coffee were in the plastic bag.
21. In our estimation, the Employer's investigation was unreasonably inadequate and or incomplete. Its failure to provide the Employee with any or any sufficient opportunity to exculpate herself means that it failed the statutory test of reasonableness under section C 58 (2) of the Labour Code. As a result, we declare that the Employee was unfairly dismissed and is entitled to compensation.
22. In addition, we also find that the Employee is blameworthy in that she contributed to her dismissal by inappropriately having a "handful" of packs of coffee in her possession when she was about to leave the Employer's property. In the circumstances, we apportion her contribution to be 10%, by which percentage her award of compensation below will be discounted.
23. Apart from the reduction which we will make on account of her contribution, we will also set off the award, which we will make below, against the debt in the sum of \$3,261.72 acknowledged by the Employee as being owed to the Employer.

Compensation

24. In the circumstances, we award compensation as follows:

(a) Notice Pay:

Under this head, **we award the sum of \$456.00** being the equivalent of one week's salary.

(b) Loss of Protection

The Employee worked for 135 months. Her daily rate at the date of dismissal was \$91.20. Accordingly, **we award the sum of \$12,312.00** (135×91.20)

(c) Immediate Loss

The evidence discloses that the Employee made diligent efforts to find alternative employment commencing 3 months after her dismissal. She eventually found work at Keyonna Beach Hotel in April 2017. In the circumstances, we award the equivalent of 6 months' salary in the sum of \$11,856.00 ($6 \times \$1,976$). In our estimation, by the end of 2016 the Employee should have been able to find alternative employment paying at least 50% of her former salary. In the circumstances we award the additional sum of \$2,964.00, being the equivalent of 3 months' salary at the rate of \$988.00 (one half of previous salary). Therefore, **the total award under this head is \$14,820.00**

(d) Future Loss

The evidence discloses no basis for an award under this head

(e) Fringe Benefits

Under this head, **we award the sum of \$7,280.00** ($6 \times \$1,213.33$), being the equivalent of 6 months' average service charge.

25. The aggregate award is \$34,868.00, which sum we discount by 10% on account of the Employee's contribution. We also reduce the aggregate sum by \$3,261.72, being the amount of the debt owed. As a result, the net amount due to the Employee is \$28,119.28.

Order

26. In the premises, we order that:

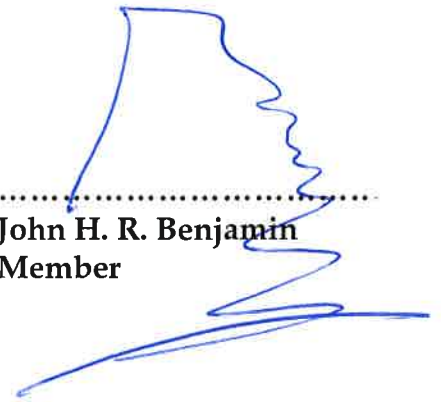
1. The Employer shall pay the net sum of \$28,119.28 to the Employee as compensation for her unfair dismissal.

2. The said sum of \$28,119.28 shall be paid by the Employer to the Employee no later than December 31, 2021.

Dated  day of December 2021



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Charlesworth O. D. Browr.
President



.....
John H. R. Benjamin
Member

