

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 18 of 2017

BETWEEN:

KEITHLEY "KEITHROY" CORBETT

Employee

And

ST. JOHN'S DEVELOPMENT CORPORATION

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Collin R. Maynard

Member

The Hon. Hesketh Williams

Member

Appearances:

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

Mr. Hugh Marshall of Marshall & Co, Attorney-at-Law for the Employer

2022: October 31

2022: November 11

JUDGMENT

Brown, P:

Summary of Facts

1. Having regard to the pleadings, the written and oral evidence, the supporting documents and the submissions of the Representatives, our findings of fact are summarized below.
2. The Employer is a statutory body established under the St. John's Development Corporation Act, Cap. 392 of the Laws of Antigua and Barbuda, with its principal place of business situate at Heritage Quay, Thames Street in the City of St.



John's. Its responsibilities and duties include the rental of commercial space to vendors carrying on business at the Vendors' Mall and Heritage Quay, the Vendor's Square at the corner of High and Thames Street and the Public Market Complex at Valley Road, in the City of St. John's.

3. The Employee commenced his employment with the Employer as a Liaison Officer on or about **February 1, 2008**. As of March 1, 2016, his salary was \$1,623.22 per month. His duties, as outlined in his job description, included the monitoring of vendors; the inspection of booths and stalls; the patrol of assigned areas; and the collection of licence fees during his regular hours of work and occasionally on Saturdays and public holidays.
4. On Monday **August 1, 2011**, a public holiday, the Employee and one of his colleagues, Ms. Bonnilyn De Silva-Joseph, were on duty collecting fees from vendors during the annual J'ouvert celebrations. While the celebrations were still in progress, the Employee was kicked on his right knee by one of the revellers.
5. The Employee and his colleague reported the matter to the Employer two days later on **August 3, 2011**, and the Employer arranged for him to consult with Dr. Delrose Christian, a Family Physician.
6. The Employee consulted with Dr. Christian nine months later on **May 19, 2012**. Dr. Christian was in no position to make a connection between the pain he was experiencing and the incident nine months earlier. Instead, the doctor opined that the Employee's pain was "very likely" due to osteoarthritis associated with the natural ageing process.
7. On **August 12, 2014**, upon referral by Dr. Fouad Naffouj, the Employee consulted with Dr. K.K Singh, an Orthopedic Surgeon. In his report dated **September 3, 2014**, Dr. Singh stated the Employee had suffered "*complex occupational knee injuries*" and "*will require a final assessment to evaluate the*

duration of his temporary disability and to calculate the percentage of permanent physical impairments at the end of his treatment and surgical procedures recommended”

8. The Employee advanced a claim for damages against the Employer, which it rejected. As a result, on **November 27, 2014**, the Employee commenced proceedings in the High Court against the Employer claiming damages for his personal injuries.
9. In his follow-up report dated **May 1, 2015**, Dr. Singh stated that the Employee “*is unfit to do manual labour, stand for long duration of intervals and walk long distances. Mr. Corbett can function in a sedentary nature of job in given environment until he gets his final surgical resolution*”. Dr. Singh further stated, “*we will appreciate immediate compensation for him to have this advised surgery locally and to make the arrangement in his working environment to accommodate him in a sedentary job for the duration of six months after the end of his sick leave.*”
10. After receipt of Dr. Singh’s reports, the Employee was transferred to the Vendors’ Square and required to perform only “*light and reduced duties*”, but the Employer did not issue him with a revised job description. Thereafter, the employment relationship became strained and unsettled.
11. During the month of **August 2015**, the Employer concluded that the Employee had refused to carry out his supervisor’s instruction to deliver letters to tenants at the Vendors’ Square. In her letter dated **August 25, 2015**, escalating the matter to Mr. Neil Butler, the Employer’s Executive Director, the Employee’s supervisor, Ms. Dianne Richards, stated, “*I am hoping that the Corporation can do something about Mr. Corbett’s behaviour, because Mr. Corbett does not behave like he works with the Corporation, he works for himself*”.

12. Based on his supervisor's report, the Employer decided to issue him with a warning letter. In his warning letter dated **September 7, 2015**, Mr. Butler stated that on at least two occasions the Employee had declined to sit in a meeting with members of staff regarding the performance of his duties. He further stated, "*Mr. Corbett your general attitude towards your work needs an immediate improvement*" and warned him of further disciplinary action if there was no such improvement.
13. Subsequently, the Employer determined that there was no improvement in the Employee's attitude and behaviour. Consequently, by letter dated **October 23, 2015**, his supervisor referred to the Employee's second refusal to comply with her orders to deliver letters to the Vendors and warned him that a repeat of his behaviour would result in further disciplinary action. As a follow-up, by letter dated October 23, 2015, the Employee was summoned to Mr. Butler's office where, he became "*boisterous and belligerent*" to Mr. Butler. As a result of his behaviour, the Employee was suspended for 2 weeks without pay.
14. By letter dated **February 26, 2016**, the Employer transferred the Employee to the Public Market Complex with effect from March 1, 2016, to work under the supervision of Mr. Vanroy Gardner, the Coordinator at that location. On the date the Employee received the notice of his transfer, Dr. Singh issued an updated medical report confirming that the Employee was "*unfit to do full time normal duties*" and advised that he continue "*light duties indefinitely until his surgical resolution and rehabilitation is completed.*"
15. Upon reporting to work at the Public Market Complex on **March 1, 2016**, Mr. Gardner advised the Employee of his duties to do collections of licence fees at the Complex. Having heard the duties outlined to him, the Employee objected on the ground that those duties were not a part of his job description, a revision of which was pending. The Employee also stated that, based on Dr. Singh's report, he could not do that type of work.

16. As a result of the Employee's objection and related statements, Mr. Gardner directed him to report his concerns to the Human Resources Department. Upon meeting with Ms. Bernadette Emmanuel, the Personnel Manager, the Employee was directed to report for a meeting with Mr. Butler.
17. At the meeting, Mr. Butler reviewed the situation including the Employee's past infractions, including the one for which he had been suspended five months earlier, and decided to dismiss him. Immediately after making its decision, the Employer issued the dismissal letter dated **March 1, 2016**, dismissing the Employee on the ground of "*extreme insolence*".
18. Being dissatisfied with his dismissal, the Employee commenced these proceedings on **March 1, 2017**, contending that he was unfairly dismissed and is entitled to compensation.
19. In her judgement delivered on **January 16, 2019**, Joseph-Ollivetti J. found that the Employee was not injured during the course of his employment but rather while he was on a frolic of his own. The learned Judge found the Employee to be an unreliable witness and pointed out specific aspects where his version of the events was "*patently untrue*".

Discussion

Overview of the Opposing Positions:

20. The Employer's main reasons for the dismissal were the Employee's refusal to perform his duties, particularly on March 1, 2016, his past history of insolence and his continuous negative work attitude and behaviour.
21. In his Memorandum of Claim, the Employee contended that, in light of Dr. Singh's reports, in response of which he was placed on light and reduced duties,

the Employer adopted a negative attitude towards him. That attitude culminated in a plan to terminate his employment.

22. Further, the Employee contended that Mr. Gardner refused to accept Dr. Singh's report dated February 26, 2016, which meant that the Employer did not take his medical condition and related concerns seriously.

23. In addition, the Employee maintained that he did not refuse to carry out the duties outlined by Mr. Gardner. In any event, he was entitled to refuse to do so on the ground that those duties posed a danger to his health and safety.

24. Perhaps most importantly, the Employee asserted that he was denied due process and natural justice. In that regard, he pointed out that there is no official report of Mr. Gardner's allegation of his misconduct. As a result, he did not know what he was accused of and had no opportunity to face his accuser and defend himself.

25. Moreover, the Employee contended that when he attended the meeting with Mr. Butler on March 1, 2016, he was not told that it was a disciplinary hearing. As a result, he had no opportunity to prepare his defence or seek representation.

26. The dismissal of the Employee, in the circumstances, amounted to an unfair dismissal because the Employer had acted in breach of Sections C 56, C58 and C59 of the Antigua and Barbuda Labour Code.

27. In disputing the Employee's claim, the foundation of the Employer's position was that the injuries of which he complained were not occupational in that they were not sustained in the course of his employment, as he alleged.

28. Further, the Employer contended that the Employee's bad attitude and behaviour, generally, and his related insolence, insubordination and belligerence,

in particular, were a direct result of the Employer's rejection of his claim for damages for his injuries.

29. The Employer also asserted that the light and reduced duties, such as the delivery of letters, which Employee was required to perform and which he resisted, were part of the Employer's effort to accommodate him in light of Dr. Singh's recommendation.
30. Further, the Employer emphasized that between August 2015 and March 1, 2016 when he was dismissed, it had received several complaints about the Employee's work attitude and behaviour. In particular, the Employer highlighted the Employee's refusal to carry out the specific instructions given by his supervisor in August 2015 and the related written warning he received in early September 2015.
31. In the Employer's view, despite that written warning the Employee's attitude did not improve during the following month of October 2015, as he had again refused to comply with a similar instruction. To make matters worse, when he was confronted about his repeated insubordination, the Employee became boisterous and belligerent to Mr. Butler. Consequently, he was suspended for 2 weeks without pay.

Resolution:

32. The determination of the main issue of whether or not the Employee was unfairly dismissed depends largely on the Employer's ability to discharge its statutory obligations to prove that (a) It had a good reason for the dismissal pursuant to section C58 (1) of the Labour code and (b) it acted reasonably under the circumstances pursuant to Section C 58(2).
33. The foregoing paint a clear picture that the Employer's acted reasonably in dealing with the Employee's attitude and behaviour up to the date of his

dismissal. It appears that the Employer was mindful of the requirement for a written warning in accordance with section C 59 of the Labour Code. We have no evidence that the Employee disputed any of the allegations against him. Instead, he asserted that, based on Dr. Singh's recommendation he should have been accommodated in a "*sedentary job*".

34. It is instructive that the Employer received no further medical report until February 2016 at which time Dr. Singh did not maintain his recommendation for sedentary work. Instead, he recommended that the Employee continue his *light duties* indefinitely until his required surgery was performed.
35. As we understand the evidence, February 26, 2016 marked a watershed. Up to that date the Employer had placed the Employee on "*light and reduced duties*" to which both parties consented, and which Dr. Singh endorsed. Up to that date neither party asserted an inflexible position. On the one hand, the Employee did not insist on being accommodated in a literally "*sedentary job*". On the other hand, the Employer did not take the position that there was no vacancy for a sedentary job and take steps to have the Employee examined by a medical board with a view to him being medically boarded and paid his severance entitlement in accordance with section C 16 of the Labour Code.
36. Given the consensual position as at February 26, 2016 the settled state of affairs would dictate the respective obligations of the parties going forward. The Employer was required to keep the Employee's duties "*light and reduced*" and the Employee was required to perform the "*light and reduced*" duties as instructed from time to time.
37. In light of the imminent change in the status quo as perceived by the Employee his contention was that the duties outlined by Mr. Gardner "*were quite extensive and not in keeping with my doctors' advice for reduced and light duties*". In that

38. It is not in dispute that after the Employee objected to the duties outlined by Mr. Gardner he was directed to Ms. Emmanuel, the Personnel Manager who in turn directed him to report to Mr. Butler. Soon afterwards, he was called into a meeting with both Mr. Butler and the Personnel Manager where Mr. Butler appeared to read "a text message from Mr. Gardner", after which the Employee gave his explanation and tried to deliver Dr. Singh's latest report, but it was rejected and he was summarily dismissed without further ado.

39. In light of the summary dismissal and the evidence before us, the key question is whether the Employer discharged its evidentiary burden of proving that the dismissal was not unfair. To that end, apart from the letters referred to above, it relied exclusively on the written and oral testimony of Mr. Butler.

40. At paragraph 15 of his Witness Statement Mr. Butler stated:

"On March 1, 2016, the Employee reported for duty at the Public Market Complex. Mr. Gardner advised him he was to do collections at the Public Market Complex. He immediately told Mr. Gardner he could not and would not do the allocated task and informed Mr. Gardner the assigned tasks were not part of his job description. He also informed Mr. Gardner that according to his trade union he was either a liaison officer, an inspector or a security officer. The Employee also indicated to Mr. Gardner that he had a letter from his doctor that stated he could not do that type of job. The Employee was advised that he should immediately report his concerns to the Human Resource Department and more specifically Ms. Emmanuel".

41. Based on that paragraph of Mr. Butler's evidence. It is clear that the grounds for Employee's objections to performing the duties outlined by Mr. Gardner were known to the Employer and should have been addressed. The evidence does not disclose that the Employer gave any or any sufficient consideration to the several legitimate concerns raised by the Employee. To the contrary, there

appears to have been an unfortunate rush to summarily dismiss him, partly on the grounds of his previous infractions.

42. Apart from conceding that he received no written report from Mr. Gardner; that Mr. Gardner was not present at the meeting March 1, 2016; the Employee was not aware of Mr. Gardner's account on the incident, Mr. Butler said nothing to convince us that the overall procedure adopted by the Employer was fair. We are not satisfied that the Employee knew exactly what was alleged against him by Mr. Gardner and was given a fair opportunity to state his defence in reliance on Dr. Singh's reports or otherwise.

43. By reason of matters aforesaid, we find that, although it had a good reason for the dismissal, the Employer acted unreasonably in summarily dismissing the Employee under the circumstances. As a consequence, the Employee is entitled to compensation subject to (a) his contribution, if any, to his dismissal and (b) his efforts to mitigate his loss.

Contributory Fault

44. As to the strained relationship between the parties which culminated in the Employee's dismissal, it is clear that the situation had its genesis in and crystallized from the injury the Employee sustained on J'ouvert morning in 2011. As maintained by the Employer and determined conclusively in the findings of Joseph-Olivetti, J, the Employee well knew that his injury was not occupational, yet he persisted with that assertion and caused Dr. Singh to issue his reports on that false premise. Indeed, the Employee's attitude and behaviour of which the Employer complained repeatedly, were knowingly cultivated by the Employee in reliance on the anticipated or presumed forbearance of the Employer in deference to the recommendations contained in such medical reports.

45. Upon careful consideration of the chronology outlined above and having carefully listened to him and observed his demeanour while he testified, we are inclined to

conclude that the Employee was not as completely forthright as he should have been. In the final analysis, it is our opinion that he contributed significantly to his dismissal. In particular, we conclude that during his exchange with Mr. Gardner, his attitude and behaviour are likely to have been the same or similar to those of which the Employer had repeatedly complained. In other words, when he objected to performing the duties outlined by Mr. Gardner, he was most likely no less insolent, insubordinate and obstinate as he had been to his supervisors on previous occasions.

46. On those bases, we find the Employee blameworthy and fix his contribution at 75%, by which percentage his compensation, which we will assess below, will be reduced.

Compensation

47. We assess compensation under selected headings as follows:

(1) Notice Pay

We award the sum of \$1,623.22, being the equivalent of the Employee's former salary.

(2) Basic Award / Loss of Protection

The Employee is entitled to an amount equivalent to the severance pay to which he would have been entitled if his employment was terminated because of redundancy. The period of employment lasted for eight years and one month. In accordance with Clause 17 of the Collective Agreement, **we award the sum of \$13,120.49** (\$1,623.22 x 8.083) under this heading.

(3) Immediate Loss

We are not satisfied that the Employee made sufficiently diligent efforts to mitigate his loss by attempting to find alternative employment. As result, **we limit our award under this heading to \$6,492.88**, the equivalent of his former salary for four months.

(4) Future Loss / Exemplary Damages

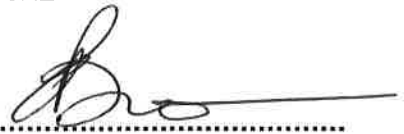
In the absence of sufficient bases, we make no awards under these headings.

48. We reduce the total amount of \$21,236.59 awarded above by 75% to \$5,309.15, on account of the Employee's contributory fault.

Order

49. In the premises, we order that the Employer shall pay the net sum of \$5,309.15 to the Employee as compensation for his unfair dismissal no later than November 30, 2022.

Dated this 11th day of November 2022


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Charlesworth O.D. Brown
President


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Collin R. Maynard
Member


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Hesketh Williams
Member

