

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.: C/UD 46 of 2018



MARK PHILLIP

Employee

and

GALLEY BAY INVESTMENT LIMITED

t/a

GALLEY BAY RESORT & SPA

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. John Benjamin

Member

The Hon. Judith Dublin

Member

Appearances:

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

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

2022: March 21

April 14

JUDGMENT

Brown, P:

Overview

1. The Employer was duly incorporated in Antigua and Barbuda and carries on business as hoteliers at its premises situate at Galley Bay in the Parish of St. John in Antigua. Its business includes the provision of watersports services to its guests.

2. The Employee commenced his employment with the Employer in November 2015 as a Watersports Attendant. He was dismissed by letter dated December 1, 2016 on the ground that he was guilty of gross insubordination and disrespect which resulted in the Employer's loss of trust in him as an employee. At the date of his dismissal, he was earning basic wages of \$472.80 per week, in addition to which he was paid \$250.00 on average as his share of the Employer's service charge fund.
3. In these proceedings, the Employee contends that he was unfairly dismissed and is entitled to compensation. The Employer disputes the claim and maintains that it had good grounds for dismissing the Employee.
4. In his Memorandum of Claim, the Employee sets out his case with a chronology of events including:
 - (a) The Employee worked in the Watersports Department and was supervised by Mr. Delbert Joshua.
 - (b) It was a policy of the Employer that the watersports area should not be left unattended as it was the base for life guard support and handing out beach towels to guests.
 - (c) On November 26, 2016 the Employee's main duties were to rake and clean the beach front of the Employer's premises.
 - (d) His supervisor informed the Employee and his colleague Mr. Ashton that they would be required to provide certain water sports services to guests that day, but did not state the time.
 - (e) The Employee left his supervisor at the watersports area and went to clean and rake the beach.
 - (f) Sometime after talking his break and having breakfast, the Employee experienced severe stomach pains which caused him to make three trips to the restroom where he spent 15 to 20 minutes on the first two occasions
 - (g) On the third occasion while in the restroom, he heard his Supervisor calling out his nickname "Kuss" but he did not respond because he was embarrassed by the sounds of his uncontrolled bowel movements.
 - (h) Approximately, 15 minutes after he heard the Supervisor call out his nickname, he heard Security Officer Fullwood having a conversation with another employee Christine. In response, he looked through the crack in the door and observed when Christine pulled on the door and realized it was locked. He did not acknowledge their presence.

- (i) In the ensuing conversation between Security Officer Fullwood and Christine, the Employee heard Ms. Fullwood confirm that someone was in the men's toilet. The Employee still did not acknowledge them or indicate his presence
 - (j) Soon afterwards, Senior Houseman, Terry Thompson came to the restroom, unlocked the door to the stall and found the Employee inside. Mr. Thompson told the Employee that management was looking for him.
 - (k) When the Employee reported to the President of Operations, Mr. Alex De Brito, he was questioned as to his whereabouts and accused of leaving the Watersports area and the CB radio unattended for over 2 hours.
 - (l) The Employee explained the reasons for his absence. In turn, he was advised that several guests had gone to the Watersports area and found it unattended so that they could not get beach towels. As a result, they alerted management of the situation.
 - (m) The Employer blamed the Employee for the "fiasco", found him guilty of gross misconduct, insubordination and disrespectful conduct which resulted in the loss of trust in him as an employee.
5. In its Memorandum of Defence, the Employer disputes the employee's claim on the following grounds:
- (a) On November 26, 2016 the Employee was instructed by his Supervisor to man the Watersports desk.
 - (b) While doing his routine checks the General Manager found the Watersports desk unattended, as a result of which he went looking for the Employee but could not find him. Along with several members of staff, including Security Officers and other watersports attendants, the General Manager spent 2 hours searching for the Employee but could not find him.
 - (c) After checking the bathroom several times and calling out the Employee's name and getting no response, the Employer realized that one of the bathroom stalls was locked from the inside. On the instructions of the Employer, the stall was unlocked and the Employee was found leaning against the wall.
 - (d) At the ensuing meeting, the Employee stated that his supervisor did not request that he be present at the Watersports desk at a particular time. He also stated that he became ill while working on the beach and had to use the bathroom.
 - (e) The Employer considered the Employee's behaviour and concluded that he was guilty of gross insubordination in that he disobeyed his supervisor's instruction. The Employer also concluded that by failing to respond to the

numerous calls when he was in the bathroom, the Employee was disrespectful and caused the Employer to lose trust in him.

Discussion

6. Given the opposing positions of the parties the main issue before us for determination is whether the Employee was unfairly dismissed. In resolving that issue we are obligated to consider whether (a) the Employer had a good case for the dismissal, and (b) the Employer acted reasonably in dismissing the Employee.
7. Having regard to the Employee's statutory right not to be unfairly dismissed, the burden is on the Employer to prove that it had a good cause and that it acted reasonably under the circumstances.
8. Given the legal framework established by the Antigua & Barbuda Labour Code, our analysis must include consideration of the content of the dismissal letter dated December 1st, 2016, excerpts from which read follows:

"Mr. Phillip, we spent approximately two hours searching for you out of fear that something had gone seriously wrong and you could be in danger. Do keep in mind that we are responsible for your safety as well. You instead cheated the Resort of two hours in a most clandestine manner. We see your behaviour as gross insubordination and failing to acknowledge that you were in the bathroom was deliberate and disrespectful. It appears that you malingered on the job, claiming to be ill. Mr. Phillip, we have lost all trust in you and as such, the employment relationship cannot reasonably be expected to continue.

This letter serves to confirm that we have no other reasonable alternative but to discontinue our working relationship and terminate your employment from the hotel effective Thursday 1st December, 2016, based on loss of trust for your disappearance from duty for over 2 hours without notification of your whereabouts, failure to carry out legal directive to monitor the watersport desk, clear insubordination and disrespect for management and your colleagues by claiming you were aware that the management, security and your colleagues were looking for you but you did not respond to them, in not following the directive given you to monitor the desk, cumulatively."

9. Based on the evidence adduced at trial, our findings of fact include the following:
 - (a) The Employer established a Watersports Department in its watersports area from which its Watersports Attendants and other watersports

personnel provided lifeguard support, beach towels and beach chairs to its guests.

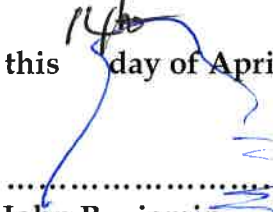
- (b) The Employee was aware of the Employer's policy that its watersports personnel should not leave the watersports area unattended.
- (c) The Watersports Department is provided with a CB radio for use at its workstation to notify the Security Department to send a security officer to stand in, in the event that a lone attendant had to leave the area on a meal or bathroom break.
- (d) After his scheduled break in the morning of Saturday, November 26, 2016, the Employee was absent from both his workstation in the watersports desk and his designated work area along the beach for over one hour during his work shift which started at 6.00 am. and was scheduled to end at 3.00 pm.
- (e) The Employee did not obtain the permission of or notify his supervisor or any other member of the Employer's management team before or during his absence.
- (f) While the Employee was absent, at least four guests arrived at the watersports desk and found no one to deliver beach towels to them or otherwise provide any of the watersports services. One of the guests made a transmission on the CB radio notifying management personnel of the situation and requesting that they be provided with beach towels.
- (g) Sometime between 10.30 am. and 11.20 am. the General Manager, at least two Security Officers, Ms. James and Ms. Fullwood, the Environmentalist, Christine, and another Watersports Attendant, Hugh Ashton, searched the hotel premises, including the entire beach area, two bathrooms and the utility rooms, but did not find the Employee.
- (h) During his absence when his whereabouts were unknown to the Employer, the Employee spent time in the bathroom from where he heard his nickname "Kuss" being called out by his colleague, Mr. Ashton, at least twice.
- (i) While he remained in the bathroom, the Employee overheard a conversation between Ms. Fullwood and Christine in the bathroom as they were searching for him. He also saw Christine pull on the door to the stall he occupied as she attempted to open it and realized it was locked from the inside.
- (j) The Employee refused to respond to his nickname and otherwise refused to acknowledge the presence of his co-workers in the bathroom searching for him.
- (k) The Employer's Houseman, Terry Thompson, entered the bathroom with a key and opened the stall occupied by the Employee and found him leaning against the wall.

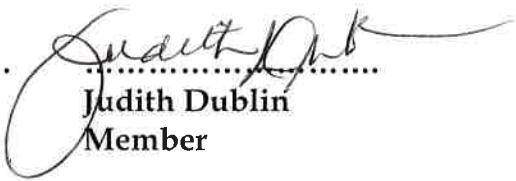
10. The foregoing findings of fact sufficiently approximate the pertinent contents of the dismissal letter to the extent that we conclude that the Employer had a good cause for disciplining the Employee. This leaves the critical outstanding question: Did the Employer act reasonably in dismissing the Employee under the circumstances?
11. Having regard to the nature of the Employer's business and its position among the leading hotels in Antigua, we have no doubt that it placed a premium on customer satisfaction from the timely provision of the services it offered. In this case, at least four guests were inconvenienced by the absence of any of the watersports personnel at the designated area at the material time.
12. While we make no finding that the Employee was wholly responsible for what he described as a "fiasco", we surmise that the unsatisfactory state of affairs caused or had the potential to cause damage to the Employer's reputation and business. This realization most likely significantly influenced the Employer's handling of the matter. The Employer's prompt action in dismissing the Employee, as opposed to administering any lesser punishment, clearly signalled its strong displeasure in respect of the nature, gravity, and effect of the Employee's misconduct.
13. Upon careful consideration of the Employee's oral and written testimony as well as his demeanour, we found him to be an unreliable witness. In our opinion, he deliberately absented himself, without permission or notification, from both his workstation and his designated work area on the beach. In addition, he deliberately concealed his whereabouts from the Employer for over an hour. Further, while he remained in the stall in the bathroom, he deliberately refused to respond to his name although he heard it being called out several times. Moreover, while he remained in the stall, the Employee saw and heard for himself that several of his colleagues, including two security officers, were actively searching for him but he refused to reveal his whereabouts.
14. The evidence reveals that notwithstanding its preliminary conclusions about the Employee's conduct, the Employer convened a meeting with him soon after he "suddenly appeared at the water sports area at 11.20 am" after being missing in action for over one hour. At the meeting, in his defence, the Employee stated that his supervisor did not give him a specific time to report to the watersports desk and that he became ill while performing his duties on the beach as a result of which he was forced to use the bathroom at least three times.

15. Obviously, the Employer was not satisfied with the explanation given by the Employee and concluded that he was guilty of gross insubordination and disrespect for management and his colleagues, all of which caused them to lose trust in him and terminate the employment relationship by letter dated December 1, 2016.
16. Despite its admitted failure to provide the Employee with an opportunity to confront his supervisor, we find no fatal flaw in the manner in which the Employer dismissed the Employee.
17. In answering the question as to whether the Employer acted reasonably in dismissing the Employee under the circumstances, we are careful not to substitute our view for that held by the Employer. It is not what we would have done, but rather what a reasonable employer would have done. The final ancillary question is: Did the Employer's action in dismissing the Employee fall within a band of reasonable actions which a reasonable employer would take under the circumstances?
18. We answer that question in the affirmative. In our opinion, it was reasonable for the Employer to conclude that the Employee was guilty of serious insubordination and disrespectful behaviour. Ultimately, having regard to its focus on the cumulative effect of the Employee's behaviour, it was reasonable for the Employer to lose trust and confidence in him. Such a loss undermined or destroyed the root of the employment relationship and justified its termination. In the final analysis, the Employer could not reasonably be expected to continue the employment relationship.
19. For the reasons stated above, we hold that the Employee was not unfairly dismissed. Accordingly, this Reference stands dismissed with no order as to costs.


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Charlesworth O. D. Brown
President

Dated this 14th day of April 2022


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John Benjamin
Member


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Judith Dublin
Member

