

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/22 OF 2017

BETWEEN

PHILBERT RAYNES

Employee

And

THE ATTORNEY GENERAL

MINISTRY OF NATIONAL SECURITY AND LABOUR

Employers

Before:

The Hon. John Benjamin

The Hon. Samuel Aymer

The Hon. Megan Samuel-Fields

Chairman

Member

Member

Appearances:

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

Mrs. Joy Dublin-Baptiste of the Attorney General's Chambers, Attorney-at-Law for the Employers

2020: October 08

2022: October 7

JUDGMENT

Benjamin, C:

Background

1. The Employee was a non-established Government employee at the Immigration Department of Antigua and Barbuda. He commenced his employment in March 2003 as a Field Officer and was subsequently appointed by the Governor General as Immigration Officer V with effect from January 1, 2005.
2. The employment relationship was governed largely by the Antigua and Barbuda Labour Code (the Labour Code), the Immigration and Passport (Amendment) Act 1999, and a Collective Agreement dated December 31, 2004, between The Government and The Antigua Trades and Labour Union.
3. In addition to his monthly salary of \$2,680.00, the Employee also received a duty allowance of \$300.00 and travelling allowance of \$227.00. He was also entitled to 25 working days' vacation per year.



4. By letter dated March 13, 2012, the Employer terminated the services of the Employee, with effect from March 16, 2012. By that letter, the Employer acknowledged that the Employee was entitled to 86 days accrued vacation.

The Employee's Case

5. In this Reference, the Employee raises the issues of "unlawful" suspension and unfair dismissal. We will proceed on the basis that the former issue before the Court is incorrectly labelled and should in fact be "unfair" suspension. Accordingly, the Employee advances his claims of unfair suspension and unfair dismissal on the following grounds:
 - 1) On or about October 4, 2011, the Employee received a letter from the Employer alleging that he had committed a breach of procedure on September 25, 2011. Additionally, in that letter, the Employer accused him of disobeying the instructions of the Senior Supervisor on duty in an effort to assist undesirable passengers who arrived on flight BW-414 from Kingston Jamaica on that date.
 - 2) On October 12, 2011, a disciplinary hearing chaired by Ms. Joycelyn Hughes, Station Chief, was held to discuss the matter. At the hearing, the Employee denied both accusations. None of the persons present at the hearing gave any evidence indicating that the Employee had done anything wrong on September 25, 2011, yet the Employer issued the Employee with a letter suspending him for 4 weeks without pay.
 - 3) On February 13, 2012, the Employee attended the Immigration Department's annual staff meeting at 4:00 pm. at the Heritage Hotel conference room. In attendance were: Honorable Dr. Errol L. Cort, Minister of National Security & Labour, Ms. Sharon Peters, Permanent Secretary, and Lt. Col. Ivor Walker, Chief Immigration Officer.
 - 4) The Employee was scheduled to report for duty at the airport at 6:00 P.M. that day, and during the latter stages of the meeting availed himself of the opportunity to address his suspension issue to the Minister and other Ministry officials in the open meeting. After expressing his grievance, the Employee quickly departed the meeting in order to report for duty as scheduled.
 - 5) On **February 16, 2012**, the Employee received a letter of same date from the Chief Immigration Officer concerning an investigation into a charge of "gross disrespect and outrageous behaviour" in the staff meeting. By that letter, he was suspended with immediate effect for 28 days without pay, pending the outcome of the investigation. The letter did not contain the particulars of the disrespectful and outrageous behaviour of which he was accused. However, it was stated that the purpose of the investigation was to determine the suitability of the Employee to continue operating in his capacity as an Immigration Officer.

- 6) On **February 28, 2012**, the Employer held a disciplinary hearing at which Mr. Ralph Potter of the Antigua Trades & Labour Union accompanied and represented the Employee. On the same day, Mr. Potter wrote to the Ministry expressing his dismay about the bias and prejudicial conduct of the hearing. He complained that the Permanent Secretary, Ms. Sharon Peters, rather than treat the allegations as such, stated categorically, in the presence of the Employer's staff, that "he did it", even before the Employee was able to respond to the allegations.
- 7) By her letter dated **March 13, 2012**, Ms. Peters terminated the employment relationship with effect from **March 16, 2012**.
- 8) Based on the Ruling of Remy J. in the case of *Angelique Ford v Permanent Secretary, National Security & Labour No. ANUHCV 2012/0209*, the dismissal letter is ultra vires because the Permanent Secretary is not vested with the authority to effect disciplinary action against a non-established worker, like the Employee, unless it is done under the express direction of the Minister.
- 9) Since the Permanent Secretary lacked the legal authority to issue the dismissal letter, the Employer was estopped from avoiding the consequences of **C 10 (1) and C 10 (4)** of the Labour Code requiring it to furnish a written statement of the precise reason for the termination.
- 10) Since the dismissal letter is ultra vires, the termination of the Employee's employment by that means automatically rendered the dismissal unfair.
- 11) Similarly, since the two suspensions of the Employee were improperly effected by letters issued by the Permanent Secretary, they were also ultra vires with the result that the suspensions were also automatically rendered unfair.
- 12) The Employee was not paid for his 86 accrued vacation days which had been acknowledged by the Employer.

The Employer's Case

6. In disputing the Employee's claims, the Employer relies on the following grounds:
 - 1) The Employer conducted a proper investigation and invited the Employee and his Union Representative to the disciplinary hearing on October 12, 2011, in respect of the allegation of breach of procedures against the Employee. At the hearing, the Employee was given the opportunity to be heard, to defend himself and to produce witnesses.
 - 2) In relation to his suspension for 28 days in February of 2012, the Employee "...was aware of the misconduct, inappropriate behaviour and lack of improvement in [his] general attitude..." of which he was accused. At all material times "...good industrial relation practices were followed to ensure that the Employee received a fair hearing"

- 3) During the annual staff meeting held on February 13, 2012, "the Employee conducted himself in a very disrespectful and insubordinate manner having no regard for the presence of the Ministry Officials and senior members of staff, and then walked out of the meeting".
- 4) The Employee was dismissed "...as a result of his continuous misconduct, gross insubordination, lack of respect for authority and rudeness".
- 5) The Employee is estopped from pursuing this matter before this Court because it was previously adjudicated by the High Court in the Claim ANUHCv 2013/0375: **Philbert Raynes and Danielle Otto v Permanent Secretary and Ministry of National Security and Labour**. In the circumstances, the Employer relies on the doctrine of *res judicata* in its defence.
- 6) The Employee was not unfairly dismissed and is not entitled to the relief claimed.
- 7) If he was unfairly dismissed, which the Employer disputes, then the Employee contributed to his own demise.

Discussion

Res Judicata

7. In our discussion below we will first consider the Employer's alternative defence of *res judicata*, which, if it succeeds, will wholly determine this matter in its favour.
8. According to **Black's Law Dictionary, 10th Edition**, the doctrine of *res judicata* applies to situations where "an issue has been definitively settled by a judicial decision". At page 1504 the Editors state as follows: "The three essential elements are:
 1. an earlier decision on the issue,
 2. a final judgement on the merits, and
 3. the involvement of the same parties, or parties in privity with the original parties."
9. In the matter of ANUHCv2013/0375 **Philbert Raynes and Dianelle Otto v Permanent Secretary and the Ministry of National Security and Labour**, which was consolidated with a similar matter in which Leslie Dunnah was the Claimant, Henry J. ruled that the termination was done contrary to law, because the Permanent Secretary did not have the authority to dismiss the Employee. However, at paragraphs 31 to 33 of her ruling, the Learned judge stated:
 31. *"In the case of Leslie Dunnah, it is unlikely that any other action than termination would have been taken, given the nature of the findings. A similar conclusion can be reached in regard to the other two claimants. It is unlikely that having received the findings and the recommendation of the Minister, that a different result would have been reached by the Governor General.*

32. *Furthermore, it is appropriate to consider the impact on the Immigration Department were the court to grant the requested relief. In each case the claimant has been found to have committed serious wrongdoings – two involving gross insubordination towards superiors produced no result and one involving fraud. To return each to the department would no doubt have a negative impact on the department.*
33. *The court is of the view that there has been an unreasonable delay before making the application and there is sufficient evidence before the court to conclude that to grant the relief sought by the claimants would be detrimental to good public administration."*
10. In reliance on that expressed opinion of the Learned Judge, the Employer invoked the res judicata doctrine. It contended that litigating unfair dismissal in the Industrial Court, after the High Court has already ruled that the Employee committed gross insubordination, is tantamount to an abuse of process.
11. As we understand the Judgement of Henry J on which the Employer relies, it was mainly concerned with the determination of the claimants' applications for an order of certiorari to quash the decisions of the Permanent Secretary to terminate their services.
12. Having regard to the elements of res judicata, we find that:
- 1) The issues which the High Court determined were not the same as the issues in the instant Reference. We are mindful of the statutory genesis of the Employee's right not to be unfairly dismissed or unfairly suspended. The Learned Judge did not expressly consider the provisions of the Labour Code in so far as the issues of unfair suspension and unfair dismissal are concerned.
 - 2) As to the second element, it follows that there was no determination of any claims on their merits in respect of the issues of unfair suspension and unfair dismissal.
13. The High Court never ruled on the issues of unfair suspension and unfair dismissal because they were never put to it for consideration. The Employee proceeded to the Industrial Court to consider his claims as he is entitled to do. Given these circumstances, the Employer is unable to succeed with its defence of res judicata. We will, therefore, proceed to examine the evidence presented in the instant case to determine whether the Employee was unfairly suspended and /or unfairly dismissed within the legal framework as established under the Labor Code.

The Legal Framework

14. The statutory right of an employee not to be **unfairly dismissed** is established by section C 56 of the Labour Code, which provides: **"Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause"**.
15. In terms of good causes for dismissal, section C 58 (1) provides:

"A dismissal shall not be unfair if the reason assigned by the employer therefor

- a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2)**

- e) "**

Provided, however that there is a factual basis for the assigned reason".

16. Further, in terms of reasonableness, section C 58 (2) provides:

"The test, generally, for deciding whether or not a dismissal is unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal".

17. Section C 58 (1) (a) must be read in conjunction with sections C59(1), C59(2) and C59(4). Section C 59 (1) provides:

"An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to, situations in which the employee has:

- a) Conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;**
- b) Committed a criminal offence in the course of his employment, without the consent, expressed or implied, of the employer.**
- c) .."**

18. Sections C59 (2) to (4) provide for the issuance of a written warning by an employer notifying an employee of further disciplinary action, including dismissal, in the event of the repetition of a particular type of misconduct within a six-month period.

19. As to suspension, under section B3 of the Labour Code, it is defined in the following terms: "suspension means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct.

20. Thus, apart from a suspension being consequentially unfair under the preceding sections dealing mainly with unfair dismissal, a suspension which would otherwise be not unfair may be rendered unfair if it exceeds the statutory limit of four weeks.

21. As to the Court's powers in respect of unfair suspensions and unfair dismissals, sections 10(3) (a) and (b) of the Industrial Court Act (Cap 214), provides:

"Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

- a. Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;**
- b. act in accordance with equity, good conscience, and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.**

The Burden of Proof

22. Given the statutory genesis of the Employee's right not to be unfairly suspended or unfairly dismissed and given the Employer's acknowledgement that it suspended and dismissed the Employee, the onus is on the Employer to prove that the suspensions and the dismissal were not unfair.

The Suspensions

23. Ambassador Liverpool was the Employer's sole witness. His testimony was limited to reciting secondhand information. He had no firsthand knowledge about the situations leading up to either of the two suspensions or the dismissal of the Employee. His witness statement did little or nothing to assist the Employer in the discharge of its burden of proof. He stated that the Employer had "issues" with the Employee who was the subject of "disciplinary proceedings resulting from his gross insubordination, disrespect to senior officers and inappropriate behaviour". Apart from naming those broad categories, he was of no assistance in particularizing any of the alleged infractions.
24. We have carefully considered the contents of the letters issued by the Employer in relation to suspensions dated October 4, 2011, February 16, 2012 and February 17, 2012. None of them include sufficient particulars of the precise wrongdoing of which the Employee was accused and for which he was suspended. Further, Ambassador Liverpool was in no position to assist us in respect of the investigative process, if any, and the procedures undertaken by the Employer to ensure a fair hearing and the general compliance with the principles and practices of good industrial relations.
25. At the end of the day, based on the Employee's written and oral evidence, in the absence of evidence from the Employer, and in the face of the convincing submissions made by his Representative, Mr. Carty, we declare that the two suspensions of the Employee, (a) during the month of November 2011, without pay, as a penalty; and (b) with effect from February 16, 2012 for 28 days, without pay, pending an investigation, were unfair.

The Dismissal

26. In relation to the Annual Staff Meeting on February 13, 2012, Ambassador Liverpool testified that the Employer had received "reports of misconduct and unacceptable behaviour". He was in no position to elaborate on any of the allegations. Moreover, he stated that at the subsequent disciplinary hearing, the Employee displayed "a lack of self-control and ...disruptive crude behaviour". Ultimately, Ambassador Liverpool stated that "the Employer concluded that the Employee was guilty of misconduct and unacceptable behaviour" on the basis of which, his employment was terminated.
27. Again, since the Ambassador was not present either at the Meeting on February 13, 2012 or at the hearing on February 28, 2012, he was in no position to counter the written evidence or the oral testimony of the Employee as to what transpired on those occasions. As a result, there is a clear preponderance of evidence in favour of the Employee. In that regard, we find Mr. Potter's letter after the disciplinary hearing on February 28, 2012, to be very instructive. On behalf of the Antigua Trades & Labour Union, he expressed his "displeasure" at the utterance of the Permanent Secretary, who was conducting the hearing that the Employee was guilty even before the accusations were put to him.
28. It is worth emphasizing that the Employer presented no witness who was present at either the staff meeting or the disciplinary hearing. Moreover, no minutes of either meeting were presented at the trial. Both omissions virtually precluded the Employer from discharging its burden of proof. Clearly, it was not sufficient for the Employer to merely rely on its bare allegations that the Employee was guilty of gross misconduct, gross disrespect, and/or gross insubordination. At the trial, it was vital for the Employer to adduce oral and/or written evidence to substantiate the actual words the Employee used, his demeanor, disrespectful behavior, gross insubordination, misconduct or other infraction.
29. In the final analysis, we find that the Employer has failed to discharge his burden of proving that the dismissal was not unfair. It has not established (a) the particulars of and an unimpeachable factual basis for the misconduct on which it relied; (b) that it adopted a fair procedure prior to and at the disciplinary hearing; and (3) that it acted reasonably in dismissing the Employee under the circumstances. In other words, we conclude that the Employee was unfairly dismissed and is entitled to compensation.

The Disciplinary Proceedings

30. In his closing submissions, notwithstanding his acknowledgement of the letter terminating the Employee's services, Mr. Carty submitted that "it would be factually correct to say that the Employer did not issue the Employee with a statement of termination pursuant to the legal requirement of section C 10 of the Labour Code. That submission is grounded on the Ruling of Remy, J. in the **Anjelique Ford case**, in which she expressly disagreed with Counsel that the Permanent Secretary is responsible for managing the day-to-day affairs of the Ministry, including the investigation of alleged misconduct by employees within the

Ministry. In reference to non-established employees of the government, at paragraph 37 of her judgment, the Learned Judge stated:

“...The role of the Permanent Secretary is not one of control, but is a supervisory one. Further, the Permanent Secretary’s supervisory role is circumscribed by the direction of the Minister. In my view, therefore, that section 78 (1) of the Constitution does not authorize the Permanent Secretary to initiate disciplinary proceedings against the Claimant”.

31. In passing, we note that the foregoing dictum in the Ruling of the Learned Judge provided the acknowledged firm ground for the Government’s subsequent policy directive given by the Attorney General, Justin L. Simon, on February 20, 2013, that:

“...the instituting of any proceedings against a non-established employee can only be done on the clear and unambiguous directions of a Minister and, that in writing to such employees, the Permanent Secretary must indicate that he / she has been directed by the Minister who will make the decision as to the disciplinary action ultimately taken against such employee.”

32. In the circumstances, in the absence of any evidence that the Minister initiated or expressly directed the Permanent Secretary to initiate the disciplinary proceedings against the Employee, such proceedings, including the suspension letters, are ultra vires and cannot be relied upon as part of the desired good industrial relations practices. On that basis, we agree with Mr. Carty’s submission that the dismissal letter cannot stand as the mandatory statement of the precise reason for the dismissal.
33. Thus, from this perspective, in addition to the reasons stated above, the ultra vires actions of the Permanent Secretary mean that the Employer has advanced no grounds for the suspensions and no statement of the precise reason for the dismissal. In confirmation of those made earlier, the inevitable conclusions are that the Employee was unfairly suspended and unfairly dismissed.

Contributory Fault

34. Bearing in mind the Employer’s averment in that regard, we are obligated to consider whether the Employee was blameworthy and contributed to his suspensions and dismissal. As to the suspensions, although we note the serious allegations against the Employee, there is no evidence before us to render him blameworthy for his two unfair suspensions.
35. As to the dismissal, by the date of the Annual Staff Meeting on February 13, 2012, the Employee was keenly aware of a serious strain in the employment relationship. It appears that he attended the meeting with the intention to express his grievance. At paragraphs 20 and 21 of his witness statement, he states:

“When I got the opportunity to speak, I openly voiced my grievance about my recent unfair suspension at the hands of the Permanent Secretary and left the meeting shortly thereafter in order to report for duty at the Airport to meet the shift start.

In my comments, I asked that my superior explain to the Minister what was the reason for my suspension. I do not recall that there was any specific response to that question at that point I left the meeting for work."

At the trial, those statements remain virtually unchallenged and wholly uncontroverted since there was no contrary evidence from the Employer.

36. Having carefully considered all the evidence, we find nothing on the basis of which we would conclude that the Employee contributed to his suspensions and dismissal. Nevertheless, we feel obligated to extend our consideration to include the ultimate conclusion of the Learned Justice Henry in the High Court proceedings that the Employee had committed a serious wrong which she characterized as gross misconduct. Based on that judicial pronouncement, we feel constrained to find that the Employee contributed to his dismissal. And we fix that contribution at 20% by which percentage his compensation assessed below under selected headings will be reduced.

The Awards

37. We award compensation under the following Heads:

1) Notice Pay

The Employee is entitled to one month's pay in lieu of notice. Given his former basic monthly salary, we award him the sum of **\$2,680.00** under this head. This amount is discounted by 20% to **\$2,144.00**.

2) Vacation Pay

Based on the evidence presented in Court, the Employee had **86** unused vacation days as at the date of the termination of his employment. The Employer failed to produce in Court any evidence that it had paid the Employee in lieu of his 86 days' vacation entitlement. The Court therefore orders the Employer to pay the Employee his full vacation entitlement of **\$10,637.34** (Monthly \$2,680.00 X 12/52/5 = \$123.69 per day).

3) Loss of Job Protection

Loss of protection is the equivalent of Severance Pay if the Employee's position had become redundant. The Employee worked from March 2003 to March 2012, a period of nine years. We therefore award him **\$24,120.00** under this Head, the equivalent of nine months' basic pay (\$2,680 X 9 = \$24,120.00). After applying the discount of 20%, the net amount due under this head is **\$19,296.00**.

4) Immediate Loss

The Employee testified that during the two years immediately following his dismissal, he made inquiries at various business places in search of work but was not successful in securing employment.

Taking his oral testimony into account, we believe that the Employee should have been more diligent in applying for employment soon after his dismissal and accordingly assess his immediate loss as the equivalent of three months' full monthly emoluments. We therefore award him **\$9,621.00**, which is three months' total emoluments, to compensate for his immediate loss. His full monthly emoluments of \$3,207.00 comprised basic salary \$2,680, duty allowance \$300 and travelling allowance \$227. After applying the 20% discount, the net award under this head is **\$7,696.80**.

5) Unfair Suspensions

Having regard to the evidence, the Employer is obligated to pay his full monthly emoluments (salary, duty allowances and travelling allowance) to the Employee in respect of the two one-month periods of suspension. We therefore award the sum of **\$6,414.00** (\$3,207.00 X 2). We make no reduction to this award.

6) Exemplary Damages

Having considered all the evidence, we find no basis for any award under this heading.

Order

38. In the circumstances, we order that:

1) The Employer shall pay the Employee the total net sum of **\$46,188.14** no later than November 30, 2022, in full settlement of his claims for unfair dismissal, unfair suspensions and pay in lieu of vacation.

(2) There shall be no order as to costs.

Dated this **7th** day of October 2022

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John H. R. Benjamin
Chairman

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Samuel Aymer
Member

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Megan Samuel-Fields
Member

