

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO C/45 of 2017

BETWEEN:

SHAMEEK ACHAM

Employee

and

CLIENT COMMUNICATIONS SERVICES INC.

(Formerly Call Centre Services Inc.)

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Samuel Aymer

The Hon. Megan Samuel- Fields

President

Member

Member

Appearances:

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

Dr. L. Errol Cort of Cort & Cort, Attorneys-at-Law for the Employer

2021: June 9

2022: February 10

JUDGMENT

Brown, P:

Background

1. The Employer is an international business corporation duly incorporated under the laws of Antigua and Barbuda. At all material times, it was carrying on the business of a call centre from its premises on Old Parham Road, St John's, Antigua. Its core business included the administration of telephone enquiries from customers around the world engaged in gaming transactions. For the desired purpose, it employed



several Customer Service Representatives to deal with enquires related to the individual accounts of its gaming customers. Being concerned with the maintenance of high levels of excellence in courtesy, efficiency and responsiveness, the Employer recorded all telephone conversations and also employed a Service Excellence Team to randomly monitor and review the conduct and performance of its Customer Service Representatives.

2. The Employee commenced her employment as a Customer Service Representative of the Employer with effect from July 14, 2014. Her salary was \$1,500.00 per fortnight. The need for high levels of excellence in her interaction with customers was brought home to her during the course of her employment. She was issued with a copy of the Employer's Service Excellence Policies and its Code of Conduct Handbook and given specialized on-the-job training from time to time.
3. In carrying out one of its several random reviews in January 2016, the Service Excellence Team concluded that on January 12, 2016 the Employee's conduct was "wholly unprofessional". Further, the Team also concluded that on December 16, 2015 the Employee's behaviour was "argumentative, discourteous and offensive".
4. Based on those conclusions, the Employer disciplined the Employee by suspending her for 5 days. In the letter of suspension, the Employer described what it referred to as the Employee's "unacceptable" behaviour and warned her that "If another issue of this nature occurs again, your employment...will be immediately reviewed and termination may occur"
5. On or about February 2016, in carrying out another one of its several random reviews, the Service Excellence Team concluded that the Employee's response to a customer on February 21, 2016, was a repeat of the earlier behaviour in that she was again "argumentative, interruptive, rude and contrary to the Employer's written policies and procedures".
6. By letter dated February 25, 2016, the Employee was dismissed with immediate effect on the ground that she had exhibited "extremely poor customer service" following her suspension one month earlier for "unacceptable Customer Service to two customers".
7. The Employee commenced these proceedings on April 21, 2017, claiming compensation for unfair suspension and unfair dismissal.

Findings of Fact and the Legal Framework

8. The Employee contended that she was unfairly suspended and unfairly dismissed because the Employer had no good factual bases for suspending and dismissing her and, in relation to her suspension, she was afforded no fair opportunity to seek advice or representation.
9. For its part, the Employer contended that the random reviews carried out by its Service Excellence Team, including the monitoring of, and listening to the audio recordings of telephone conversations between the Employee and its customers, provided it with direct first-hand information of the Employee's behaviour and performance, which in turn, provided the factual bases for suspending and dismissing her.
10. As to the fairness of the disciplinary process, the Employer maintained that, prior to being suspended and dismissed, the Employee was given opportunities to listen to the relevant audio recordings and respond to the allegations against her about her behaviour and performance.
11. Inevitably, given the Employee's right not to be unfairly dismissed, we are obligated to have particular regard for the provisions of sections C 58 and C 59 of the Antigua and Barbuda Labour Code (the Labour Code) and determine:
 - (a) whether the Employer had a good cause for suspending the Employee;
 - (b) whether the Employer had a good cause for dismissing the Employee;
 - (c) whether the Employer acted reasonably in the circumstances when it suspended the Employee; and
 - (d) whether the Employer acted reasonably in the circumstances when it dismissed the Employee.
12. It is instructive to note that, under cross examination, the Employee acknowledged the important role of the Employer's procedures; that customers could be won or lost as a result of how calls are handled; that the Employer engaged in a lot of on-the-job training and mentoring about how to handle calls and react to customers; that the Employer provided its employees with manuals, including a Handbook and a Code of Conduct which listed infractions that could lead to dismissal; that all the calls were recorded; and that calls could be randomly reviewed by the Service Excellence Team to assess whether the calls were handled properly.
13. In order to determine the facts which led to the suspension and the dismissal, we have carefully considered all the evidence tendered at trial and the demeanours of

the witnesses while testifying. At the end of the day, there is a clear preponderance of convincing evidence in favour of the Employer. Accordingly, where the Employee's evidence conflicts with that of the Employer, as deposed by its Human Resources Manager, Lois Johnson and its Customer Services Manager, Elvira Warren-Zachariah, we prefer the latter.

14. Accordingly, in assessing whether the Employee acted contrary to the Employer's policies, procedures and Code of Conduct, all of which were well known to her, we find that:

- (a) On December 16, 2015, the Employee misconducted herself and provided "unacceptable customer service" in that, during her telephone interaction with a customer which lasted 6 minutes and 34 seconds, she was critical of the customer, repeatedly interrupted him and spoke over him without any apology or excuse. In the circumstances, it was reasonable for the Employer to describe her behaviour as being "argumentative, discourteous and offensive".
- (b) On January 12, 2016, the Employee again misconducted herself and provided "unacceptable customer service" in that, before addressing a customer's enquiry which she had then just received, she responded by making "a very heavy, audible sigh". In the circumstances, it was reasonable for the Employer to conclude that, by responding as she did, the Employee was intimating to the customer that either she did not wish to be bothered or that he was being a nuisance to her. Further, it was also reasonable for the Employer to conclude that she behaved in a manner which was "wholly unprofessional". Moreover, it was reasonable for the Employer to describe the Employee's "tone", in this instance like the one before, as being "unfriendly, rude and argumentative".
- (c) On February 21, 2016, the Employee further misconducted herself and provided "unacceptable customer service" in that she was again critical of the customer, repeatedly interrupted him and spoke over him without any apology or excuse. Moreover, at the end of the call, in direct response to the customer's reciprocating wish for her to "have a good day", the Employee "rudely and discourteously" mumbled "Hmmmmmm". In the circumstances, it was reasonable for the Employer to conclude that the Employee's "argumentative, interruptive and rude" conduct was a repeat of or similar to her earlier infractions.

15. Against the backdrop of an employee's right not to be unfairly dismissed, Section C 58 (1) of the Labour Code provides that the dismissal of an employee shall not be unfair if the reason assigned by the employer for the same **"relates to the misconduct of the employee on the job, within the limitations of section C 59 (1) and (2) ... Provided, however, that there is a factual basis for the assigned reason"**. The former subsection of section C 59 provides for dismissal on the ground of serious misconduct while the latter provides for the issuance of a written warning if the misconduct in the first instance does not result in a dismissal.
16. Having regard to the nature of the Employer's business, its emphasis on providing excellent customer service and the deliberate steps it had taken to that end, we are satisfied that the Employer had good factual bases for taking disciplinary action against the Employee. Those bases, as summarized at paragraph 13 above, would constitute the statutory good causes for suspension and dismissal in sequence under section C 58 (1) of the Labour Code. Thus, in our view, the Employer was in a good position at all material times to take disciplinary action, in the form of suspension followed by dismissal, against the Employee, subject to the test of reasonableness as stipulated in section C 58 (2) and within the limitations stipulated by sub sections C 59 (1) and (2) .
17. Notwithstanding the existence of a good cause, the Employer is also required to discharge its statutory obligation under section C 58 (2) to prove that it acted reasonably in the circumstances. In the absence of a single or precise legal definition of reasonableness, we will consider this requirement within the context of the express provisions of the Labour Code and the principles and practices of good industrial relations by both of which we are constrained in any event.
18. Section C 58 (2) provides that **"The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably..."**
19. As to her suspension, when we substitute the word "suspension" for "dismissal" in the test of reasonableness, we find that the Employer acted in accordance with the principles and practices of good industrial relations. It first carried out an investigation, including a review of the audio recordings. Thereafter, on January 18, 2016, the Employee was invited to a meeting with the Human Resources Manager and the Customer Service Manager where the recordings were replayed for her. She was then given an opportunity to respond to the allegations against her but was

unable to justify her misconduct. The decision was then taken to suspend her for 5 days.

20. The letter of suspension was read to the Employee, after which, it was handed to her for her to read for herself. As she acknowledged in her testimony, the Employee raised no concerns about the content of the suspension letter and at no time did she express a desire to get advice from or to be represented by a third party. Thus, in the circumstances, it was reasonable for the Employer to suspend the Employee.
21. More significantly, we find that the suspension was in accordance with the provisions of sections C 59 (2) and (3) of the Labour Code which read as follows"

"(2) Where the employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit the 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 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.

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning."

22. The inference may be drawn that the Employer decided that the infractions for which the Employee was suspended were not serious enough to permit the termination of her employment. Instead, it described the infractions of which the Employee was guilty, suspended her and warned her that if there was a recurrence of her misconduct, her employment "will be immediately reviewed and termination may occur". That course of action taken by the Employer was in full compliance with the above-stated provisions of sections C 59 (2) and (3). In that regard, it is noteworthy that the Employee expressly acknowledged that she had not only received the letter of suspension but had reviewed it with her manager and understood its contents.

23. Further, subsection C 59 (4) provides:

“(4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.”

Having regard to those provisions, the repetition of the misconduct as stated above and the clear warning in the suspension letter, we find that the Employer’s action in dismissing the Employee was consistent with the statutory provisions.

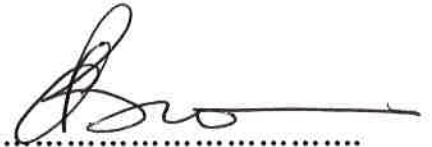
24. Not surprisingly, in his skeleton submissions, learned Counsel Dr. Cort, properly addressed the matter within the legal framework outlined above as established by “the combined effect of sections C 58 (1) (a) and C 59 (2), (3) and (4)” of the Labour Code. As to the reasonableness of the dismissal, learned Counsel also quoted an excerpt from page 256 of the textbook, **Unfair Dismissal: Employment Law Handbook** (Thomson Reuters, 2016) asserting that the nature of the Employer’s business required it to be **“particularly concerned to ensure that customer-facing staff conduct themselves politely and properly at all times. Dismissals for rudeness to or in front of a client or customer or for adopting a negative attitude with clients may well be fair”**. In this regard, we are mindful that the Employee’s conduct could have damaged or at least had the potential for damaging the Employer’s business.
25. Learned Counsel also highlighted selected paragraphs of the judgment in the UK case of **Kennedy v E. On Energy Solution, ET Case No. 1901086 /13** and urged us to come to the conclusion that **“it was entirely within the band of reasonable responses to dismiss”**. We have noted the similarities between that UK case and this Reference including the nature of the businesses, the duties of the claimants, the offensive conduct and the reliance on audio recordings. In the final analysis, in the absence of any counterbalancing submissions from Mr. Carty, the Employee’s Representative, we find Counsel’s submissions to be highly persuasive.

Conclusion

26. For the reasons stated above, we conclude that the Employer had good factual bases for suspending and dismissing the Employee. Moreover, it acted reasonably in responding as it did in the circumstances at the material times. Both the suspension and the dismissal fell squarely within the band of reasonable responses which a reasonable employer would make in those circumstances. Accordingly, we are

constrained to dismiss the Employee's claim since neither the suspension nor the dismissal was unfair.

Dated this 10th day of February, 2022



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Charlesworth O.D. Brown
President



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Samuel Aymer
Member



.....
Megan Samuel-Fields
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