

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO C/54 of 2017

BETWEEN:

ROYETTE ESPRIT-SIMON

Employee

and

THE PORT AUTHORITY

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice President

The Hon. Megan Samuel-Fields

Member

Appearances:

Dr. David Dorsett of Watt, Dorsett, Hewlett Law, Attorneys-at-Law for the Employee

Ms. Talia N. Da Costa of Stapleton Chambers, Attorneys-at-Law for the Employer

2022: February 14
March 11

JUDGMENT

Brown, P:

Background

1. The Employer is a statutory body established under section 3 of the Port Authority Act, Cap. 333 of the Laws of Antigua and Barbuda. It is charged with the development and operation of the harbours of Antigua and Barbuda, including the port at the St. John's Deep Water Harbour in St. John's Antigua.



2. The Employee commenced her employment on January 17, 2005, as Security System Operator. She held that position for over 10 years until her dismissal on July 15, 2015, at which time she was earning a monthly salary of \$3,651.45.
3. At about 3.15 pm on July 14, 2015, after she had clocked out the end of her shift and was sitting in her parked vehicle, an interaction occurred between the Employee and the Employer's Port Manager, Darwin Telemaque, as a result of which, the Employer concluded that the Employee had displayed gross misconduct and insubordination.
4. On July 15, 2015, a meeting was held between the Port Manager, the Human Resources Manager, Ms. Jacqueline Swift, the Employee's Supervisor, Shawn Joseph, the Shop Steward, Peter Leonard and the Employee. At the meeting, the Employer noted that there was no change in the Employee's attitude. As a result, taking into consideration her "serious insubordination over the two-day period", the Employer affirmed its earlier conclusion and dismissed the Employee by letter of the same date on the ground of gross misconduct.
5. The Employee commenced these proceedings on May 10, 2017, claiming that she was unfairly dismissed and is entitled to compensation.

The Proceedings

6. By her Memorandum of Claim filed on August 15, 2017, the Employee contended that her dismissal was unfair because:
 - (a) It relates to the interaction on July 14, 2015, when she was "off work" and "off the employment compound";
 - (b) It did not relate to "misconduct...on the job" so as to constitute a "good cause" under section C 58 (1) (a) of the Antigua and Barbuda Labour Code (the Labour Code).
 - (c) It was effected in circumstances that were "harsh and oppressive" and not in accordance with the principles of good industrial relations practices.
7. By its Memorandum of Defence filed on October 31, 2017, the Employer disputed the Employee's claim on the following grounds:
 - (a) The interaction occurred on its premises;

- (b) The Employee displayed gross disrespect and insubordination to the Port Manager, which amounted to a good cause for dismissal under section C 58 (1) (a) of the Labour Code;
 - (c) Alternatively, the misconduct amounted to “some other substantial reason” sufficient to bring it within the scope of section C 58 (1) (e) and justify the dismissal;
 - (d) The misconduct undermined the mutual trust and confidence between the parties;
 - (e) The dismissal was an exercise of its right to summarily dismiss the Employee;
 - (f) The dismissal was effected in accordance with good industrial relations practices.
8. Given the pleadings, the legal framework within which the main issue of unfair dismissal must be determined is established by the following provisions of sections C 58 and C59 of the Labour Code:

“C58 (1) 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) is ...some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

C 58 (2) 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 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.

C 59 (1) 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;

...

C59 (2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his 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.

(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“.

9. In accordance with the Court's well settled policy, for the avoidance of any possible real or perceived prejudicial effect, we will not consider any evidence, comments or conclusions in relation to the conciliatory hearing at the Labour Department. For that reason, save for acknowledging the fact that the conciliatory hearing occurred, we struck out all potentially prejudicial parts of the Employee's pleadings and her witness statement. In particular, we struck out paragraph 5 of the Employee's witness statement and rejected the Conciliation Report, marked "RES 3" as exhibited by her.
10. Given the Employee's right not to be unfairly dismissed and since the Employer issued the dismissal letter alleging that the Employee was guilty of "serious insubordination" which undermined the employment relationship, the onus is on the Employer to discharge its evidentiary burden of proving that the dismissal was not unfair.

11. From the Employer's perspective, the key aspects of the reasons for dismissal, as extracted from the dismissal letter are as follows:

(a) Tuesday, July 14, 2015: The Employee "totally disregarded" the Port Manager when he first instructed her to move her vehicle; that after the instruction was given for the third time, the Employee responded by saying she was on her phone and cannot drive and talk at the same time; that after been given the instruction the fourth time, the Employee continued her telephone conversation before driving off and parking next to the Distillery; that the Port Manager walked over to her and asked her to step out of her vehicle so he could have a meeting with her; that the Employee responded "no", because it was after hours, she had already clocked out and the Port Manager could only speak to her on the Port's time; that when the Port Manager repeated his instruction for the Employee to come to his office for a meeting, she again said "no", because he cannot tell her what to do and she was going to call her Union; that on the Port Manager's instruction, her Supervisor made contact with her the same afternoon and requested that she return to the Port Manager's office for a 5 o'clock meeting; that within the hearing of the Port Manager and the Human Resources Manager, the Employee told her Supervisor to "warn Mr. Telemaque from me"; that after her Supervisor told her again about the meeting, the Employee "again refused" and stated that it was afterhours, she had clocked out and was not coming to any meeting; and that she would go to the meeting the following morning when she reported for duty at 9 o'clock.

(b) Wednesday, July 15, 2015: The postponed meeting was convened with the Port Manager, the Human Resources Manager, the Shop Steward, the Supervisor, and the Employee in attendance. In response to a direct enquiry from the Shop Steward, the Employee stated that she had no prior incidents with the Port Manager; that in response to a direct follow-up question from the Shop Steward as to whether the Port Manager had approached her in an aggressive manner, the Employee replied, "Mr. Telemaque don't know how to talk to people"; and reiterated that she never had any prior incidents with the Port Manager.

12. After careful consideration of the evidence of the witnesses, our findings of fact which are substantially consistent with the contents of the dismissal letter, include the following:

- (a) Prior to July 14, 2015, the Employee was well aware of selected areas on the Employer's premises where parking was restricted in order to avoid or reduce traffic congestion and improve safety at the facility. The Employee's duties included monitoring of these areas for compliance with the restrictions.
- (b) When the sequence of events started on July 14, 2015, at approximately 3.15 pm, the Employee was sitting in her vehicle which was parked in a "no parking" zone on the Employer's premises.
- (c) An unfortunate exchange of words occurred between the Employee and the Port Manager, as a result of which the Port Manager became shocked and formed the view that the Employee was ignoring him, disrespecting him and refusing to follow his instructions.
- (d) On the other hand, the Employee formed the view that the Port Manager approached her in an aggressive manner, spoke down to her, yelled at her, disregarded her attempt to explain her presence in the restricted area, unreasonably shouted at her not to start her vehicle and unreasonably shouted at her to get out of her vehicle.
- (e) After the meeting on July 15, 2015, the Port Manager concluded that the Employee had persisted with what he described as her "nasty" attitude, which she demonstrated the previous afternoon and was guilty of serious insubordination, as she was the previous afternoon, both of which undermined the employment relationship. As a result, she was dismissed with immediate effect by letter issued on the same date.

Discussion

- 13. There can be no doubt that the provisions of section C 58, stated above, require the Employer to prove that (a) it had a good cause for the dismissal, and (b) it acted reasonably in dismissing the Employee.
- 14. In considering whether the Employer met its obligation, we paid special attention to the contents of the dismissal letter in the context of the provisions of section C 10 (3) and (4) of the Labour Code. The effect of the former subsection is that the Employer is "conclusively bound" by the contents of the dismissal letter. Further the effect of latter subsection is to prevent the Employer from introducing evidence at the trial of facts which could have been stated in the dismissal letter.
- 15. The reason for the dismissal is summarized in the penultimate paragraph on the second page of the dismissal letter as follows:

"Mrs. Esprit-Simon, Management is surprised to say the least at your behaviour. Your response and attitude to the Port Manager is tantamount to gross misconduct and cannot be tolerated. Therefore, effective immediately, your services with the Antigua Port Authority is hereby terminated."

16. As we understand the states of affairs at the material times, the respective behaviours of both the Port Manager and the Employee were offensive to each other. While we appreciate that the Port Manager was "surprised" by the Employee's behaviour, the key question arising is: Was the Employee's "response and attitude to the Port Manager...tantamount to gross misconduct"?
17. In our analysis towards answering that question, we discern from her utterances that the Employee herself appeared to have been surprised by and was complaining of the Port Manager's own approaches, responses and attitude. It is noteworthy that, although she did not do so promptly, the Employee did comply with the Port Manager's instruction to "move" her vehicle from the "no parking" area. It is also noteworthy that, although she did not return to the Employer's premises to meet with the Port Manager "afterhours" on the Tuesday afternoon, the Employee did make it clear to him and her Supervisor that she was willing to attend the meeting the very next morning. It is instructive that the Employee drove to the office of her Bargaining Agent, the Antigua and Barbuda Trades and Labour Union, consulted with her Union Representative, Mr. Ralph Potter, and attended the meeting convened by the Employer the following morning as she had undertaken to do.
18. As to the actual words spoken by the Port Manager to the Employee on the Tuesday afternoon, according to her, the Port Manager spoke to her "in an aggressive manner" and repeatedly said, "You cannot park there!". As we understand that then emerging situation, the Port Manager was conveying a zero tolerance for any breach of the parking regulation. He demonstrated that he was totally rejecting or not willing to entertain any excuses or explanations which the Employee was attempting to give.
19. Further, according to the Employee, she became "startled" by the Port Manager firstly, when he "shouted" at her, "Don't start!" meaning to her that he was commanding her not to start her own vehicle which he had just told her that she could not park there. Further, the Employee stated that she became "terrified" when he repeatedly shouted at her in a loud voice, "Get out of your vehicle!". In addition, the Employee stated that while she was "still stunned", he "yelled" at her, "Come to my office!"

20. At the postponed meeting in the following morning, the direct exchange between the Port Manager and the Employee appears to have been very limited. The attitude and response by which the Employer was offended on that occasion appears to have been limited to her response to the Shop Steward's question as to whether the Port Manager had approached her in "any aggressive manner". Her response was: "Mr. Telemaque don't know how to talk to people."
21. In our estimation, the Employee's latter response is most telling. To us, she appears to have been conveying a material grievance complaining about the Port Manager's own behaviour in respect of his approach, response and attitude towards her. In our opinion, the circumstances created an opportune time for both the Employee and the Employer to engage in some degree of introspection with a view to a mutual improvement in their respective approaches, responses and general attitude. Be that as it may, we speedily refocus on the main issue before us.
22. We note the Employer's primary reliance on "misconduct...on the job" as the "good cause" for the dismissal, which is potentially valid under section C 58 (1) (a) of the Labour Code. However, in an effort to make that cause valid, the Employer averred to the effect that since the misconduct occurred on the Employer's premises, it occurred on the job.
23. For present purposes, we equate the term "on the job" with "during the course of employment". The result is, as urged by learned Counsel, Dr Dorsett, we find that the misconduct in essence occurred in the afternoon of Monday May 14, 2015, while the Employee was off duty. As such, it does not fall in the category established by section C 58 (1) (a) of the Labour Code.
24. However, it should be noted that the particular good causes listed in section C 58 (1) are and were not intended to be exhaustive. Section C 59 (1), as stated at paragraph 8 above, allows for dismissals on the ground of serious misconduct where the same does not occur "on the job" but are "in relation to" the employment. Thus, misconduct committed off the job, including criminal or immoral conduct, could justify a dismissal. Such categories of misconduct could fall squarely under section C 58 (1) (e) as being "some other substantial reason..."
25. In order to justify a summary dismissal, as effected by the Employer in the instant case, the employer must fully discharge its evidentiary burden of proving

that the misconduct was serious enough to warrant the summary dismissal because the employer could not reasonably be expected to take any other alternative course. The burden on the employer to prove that it acted reasonably is acutely heavier if (a) the misconduct had occurred off the job, and (b) if the dismissal was summary.

26. In any event, whether the misconduct was “on the job”, under section C 58 (1) (a) or was in the category of “some other substantial reason” in or in relation to his employment, under section C 58 (1) (e), the overarching question in this Reference is: Was the misconduct serious enough to justify the summary dismissal?
27. In our opinion, the misconduct which occurred on July 14, 2015, clearly did not occur on the job and, as such, it could not have been relied by the Employer as proof that the dismissal was not unfair. And the misconduct which occurred on July 15, 2015, was largely limited to the Employee’s complaint about the Port Manager’s own behaviour - his approach and the manner in which he spoke to her - by which she was offended, the previous afternoon while she was off the job.
28. In the circumstances, we are inclined to find that the Employer had no good cause for the dismissal either under section C 58 (1) (a) or section C 58 (1) (e).
29. In the event that we are wrongly inclined, we shift our focus to the inevitable application of the test of reasonableness under section C 58 (2) of the Act. This requires us to have regard for the provisions of the Labour Code and the principles and practices of good industrial relations in determining whether the Employer acted reasonably in dismissing the Employee.
30. As we understand them, good industrial relations policies and practices place an obligation on employers to attempt to de-escalate conflicts between management and employees. In our view, the obvious conflict situation that developed on the afternoon of July 14, 2015 and continued unabated the following day resulted from the inappropriate behaviours of both the Employee and the Port Manager.
31. It is not in dispute that the initial cause of the conflict situation was the Employee’s presence in her vehicle parked in a restricted area after her shift had ended. We have no evidence of the relative seriousness of the parking violation and to what sanctions she might have been liable. However, we note that the

Employee's delay in driving away from the no parking area at Gate 2 to an area near the Distillery was short-lived.

32. It is clear that, while the Port Manager had good reasons to be concerned about the infraction and reasonably insisted that she remove her vehicle from the no parking area, he might have been excessively robust in the manner in which he instructed her not to start and then to get out of her vehicle.
33. Further, although he was already aware that the Employee did not find it convenient to attend a meeting at his office that afternoon, the Port Manager might have been unnecessarily pushy by instructing her Supervisor to request that the Employee report to his office for a meeting that afternoon.
34. In the circumstances, the Employee's loud outburst requesting that her supervisor warn the Port Manager from her was probably not as outlandish as it appeared at first blush.
35. As to the overall tone and details of the exchanges between them, it is the Port Manager's evidence that he had "never before seen that sort of behaviour from the Employee". For the Employee's part, her evidence is that in response to a question from her Shop Steward, she stated that she had "no prior incidents" with the Port Manager.
36. Most interestingly, in response to the Shop Steward's question as to whether the Port Manager had approached her in an "aggressive manner", she responded that "Mr. Telemaque don't know how to talk to people". We emphasize that this response is most striking and revealing. It brings home to us, the Employee's view that the Port Manager's manner of speaking to her when she was off duty on the afternoon of July 14, 2015, caused her to respond in the manner she did. Moreover, as we understand it, what he described as the Employee's lingering "nasty attitude" was most likely hardened or exacerbated by the Port Manager himself.
37. In our opinion, in the wake of the interactions on July 14 and 15, 2015, it was perhaps a good time for both the Port Manager and the Employee to engage in some degree of introspection. Further, perhaps the Employer could have carried out a comprehensive investigation and, if appropriate, take the lead towards an overall improvement in the approaches, responses and attitudes between its employees and its management team.

38. Needless to say, we have paid due attention to the useful oral submissions of both Learned Counsel. We find those of Dr. Dorsett, although somewhat blunt and abrupt, more convincing than those of Ms. Da Costa which were nonetheless equally spirited.
39. For the reasons stated above, given our earlier stated inclination that the Employer had no good cause for the dismissal, we find that the Employer acted unreasonably under the circumstances when it dismissed the Employee. In our view, the summary dismissal was outside the band of reasonable actions which an employer should have taken in the circumstances. A reasonable employer should have opted for disciplinary action more in line with subsections C 59 (2), (3) and (4) of the Labour Code.
40. Having come to that conclusion, we hasten to add that we also find that, because of her infraction of parking in the restricted area, her negative attitude and her inappropriate responses, the Employee is blameworthy. She contributed to her dismissal. And we apportion her contribution to be 25 per cent, by which percentage her compensation assessed below will be reduced.

Compensation

41. We award compensation as follows:

(a) Payment in lieu of Notice

Under this heading, **we award the sum of \$3,651.45** being the equivalent of one month's salary.

(b) Loss of Protection from Unfair Dismissal

Under this heading, **we award the sum of \$38,340.23**, being the equivalent of severance pay, if the same were payable, for her ten and a half years of service.

(c) Immediate Loss of earnings

An award under this heading takes into account the Employee's duty to mitigate her loss. Her evidence is that she was still unemployed up to the date of trial. However, she tendered only one copy of her application dated July 24, 2015, and two letters of reference dated March 2016. There was no

explanation as to what happened during the intervening period. The Employee also testified that she received a job offer paying \$9.50 per hour, which she declined. She did not state the date when the offer was made. In the circumstances, we are not convinced that she was as diligent as she should have been. Accordingly, we award the sum of \$10,954.35, the equivalent of her total salary for the first 3 months after her dismissal. In addition, we award the sum of \$6,014.34, being the equivalent of the difference between her former salary and the amount which she declined, for the ensuing 3 months, $(\$3,651.45 - \$1,646.67) \times 3$. Under this heading, **we award the total sum of \$16,968.69.**

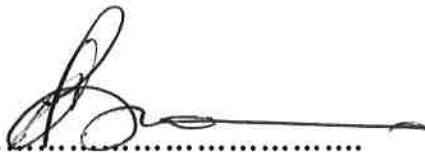
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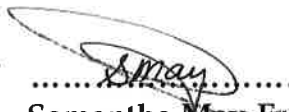
42. Towards the end of the sitting for the oral delivery of this judgment, subject to final amendments, editing and signing, Dr Dorsett submitted that the facts and circumstances disclosed above constitute "exceptional reasons" and urged the Court to include an award of costs to the Employee. Not surprisingly, Ms. Da Costa made opposing submissions. In the final analysis, we consider it proper to award prorated costs in the sum of \$3,500.00 to the Employee.

Declaration and Order

43. In the premises, we declare that the Employee was unfairly dismissed and is entitled to compensation in the net sum of \$44,220.28, being the aggregate amount of \$58,960.37 assessed above less 25%.
44. And we order that the Employer do pay the sum of \$47,720.28, inclusive of costs, to the Employee no later than April 15, 2022.

Dated this 11th day of March 2022


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Charlesworth O.D. Brown
President


.....
Samantha May-Francis
Vice President


.....
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