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ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/ 64 of 2013

BETWEEN:

WELDON MASSICOTT

Employee

and

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Mr. Justin L. Simon QC of Simon Rogers Murdoch, Attorneys-at-Law for the Employee, and with him, Mrs. Cindy Blanchard of the Antigua and Barbuda Workers' Union.

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

2018: June 7

2022: October 14

JUDGMENT

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Brown, P:

Background

1. The Employer is a statutory body established as the "Transport Board" under the Transport Board Act, 1995. It is referred to in this Reference by its well-known trade name and is responsible for the operation of school buses throughout Antigua and Barbuda. For that purpose, it employs several bus drivers.
2. The Employee commenced his employment with the Employer on April 1, 2008 as a School Bus Driver. He last earned weekly wages at the rate of \$512.00 per week. At all material times, his employment was governed in part by a Collective Agreement between the Employer and the Antigua and Barbuda Workers' Union.

3. As a result of reports which it had received about the Employee's alleged misuse of the school bus assigned to him, the Employer summoned him to a meeting on February 26, 2010. At that meeting the Employee denied the allegations against him. In particular, he denied that he used the bus to carry out personal errands including the transportation of a certain student attending the Antigua and Barbuda Institute of Continuing Education.
4. At the end of the meeting, the Employee was suspended indefinitely pending further notification from the Employer's Operations Manager, Mr. Anderson Carty. On March 2, 2010, Mr. Carty notified the Employee by telephone that his suspension would end on that date. The suspension was confirmed by letter dated March 3, 2010, on the ground that he acted in breach of the Employer's policy regarding the unauthorized use of its vehicles. The letter included a warning to the Employee any further breach of the policy by him would result in his summary dismissal.
5. After returning to work on March 3, 2010, the Employee went on prescribed sick leave until March 14, 2010. Upon his return to work on March 15, 2010, he was summoned to another meeting with Mr. Carty at which further accusations of misconduct, similar to the ones made earlier, were made against him. At the end of the meeting, the Employee was instructed to proceed on administrative leave.
6. On March 22, 2010, the Employee was orally informed by Mr. Carty that his services had been terminated with effect from March 19, 2010. On March 23, 2010, the Employee received the said letter of suspension dated March 3, 2010 and a letter of dismissal dated March 19, 2010. The latter letter was marked "Without Prejudice", and apart from terminating the Employee's services, offered to pay him an amount "equivalent to severance pay only as a measure of unmerited goodwill".

Court Proceedings

7. Being dissatisfied with his dismissal, the Employee commenced these proceedings contending that he was unfairly dismissed and is entitled to compensation.
8. Among the documents filed on behalf of the Employer on April 14, 2014, are its Memorandum of Defence in which it disclosed its intention to call Ms. Esther George as its sole witness. On the same date the Employer also filed a bundle of Exhibits, including the dismissal letter.
9. Ms. George's Witness Statement does not refer to the dismissal letter. Further, as it turned out, she did not rely on it during her oral testimony or requested that it be admitted into evidence. As a consequence, Learned Counsel, Mr. Justin

Simon QC, submitted that in the absence of consent between both Counsel, the Court should not take judicial notice of the dismissal letter.

10. In countering that submission, Learned Counsel for the Employer, Mr. Hugh Marshall, relied on the philosophy underlying the provisions of the Industrial Court Act, Cap. 214 and the Court's statutory powers in relation to its procedures and the relevant evidence which it may consider.
11. In the circumstances, we find Mr. Marshall's submissions to be more convincing on this point. Accordingly, being mindful of the Court's mandate to "act in accordance with equity, good conscience and the substantial merits of the case before it", we will suppress the relevant legal technicalities and take judicial notice of the dismissal letter and its contents.
12. Further, we are also mindful of the Employer's evidentiary burden in a situation like this where it has admitted to dismissing the Employee. It must prove that the dismissal was not unfair because it had a good cause and it acted reasonably. Therefore, we are largely concerned with the issues of whether or not the Employer discharged its statutory obligations, including those under sections C 58 (1) and C 58 (2) of the Antigua and Barbuda Labour Code (the Labour Code). In other words, the determination of the issues in this Reference will turn on whether or not the Employer proves that (a) it had a sound factual basis for the dismissal, and (b) it acted reasonably in dismissing the Employee under the then prevailing circumstances.
13. Having regard to its burden of proof, the Employer appears to have misguided itself at the outset by first signalling that Ms. George, a Bus Conductor, would be its only witness and in fact relying solely on her witness statement and oral testimony at the trial.
14. As to the factual bases of reasons assigned by the Employer for the suspensions and the dismissal of the Employee, we are inclined to agree with Mr. Simon's assertion that the Employer's failure to provide a witness from its Management Team was fatal. The Employer should have provided such a witness competent to testify with a view to establishing the necessary factual bases.
15. As to reasonableness, it is well settled that quite apart from proving that it had a good cause for dismissing the Employee, which we believe that they did not, the employer must also prove that it acted reasonably. In that regard, we have taken note of the following persuasive submissions, which are consistent with our findings of fact, made by Learned Counsel on behalf of the Employee:

- 1) The suspension letter in respect of the suspension commencing February 26, 2010, and ending on March 2, 2010, is dated March 3, 2010, and was not received by the Employee until March 23, 2010.
- 2) As a result, the warning of "instant dismissal" in the event of a repetition of the alleged misconduct was not conveyed to the Employee in a timely manner and cannot be relied on by the Employer to justify the dismissal which was effected before he received the warning.
- 3) In any event, there was no occurrence of any similar alleged breach of policy regarding the unauthorized use of the Employer's vehicles because on the date of the alleged repeat, the Employee was driving his own private vehicle.
- 4) The Employee was instructed to commence indefinite administrative leave on March 15, 2010, immediately after he returned to work from sick leave. He was never required to resume work so that his administrative leave merged seamlessly with his dismissal.
- 5) In the letter of dismissal, dated March 19, 2010, the Employer stated that the dismissal would take effect from that date. But it was not received by the Employee until March 23, 2010, up to which latter date he had presumptively remained on administrative leave.
- 6) The Employee's services were substantively terminated with effect from the commencement of his administrative leave on March 15, 2010, after which date, he received no wages.
- 7) The dismissal letter bears the heading "Without Prejudice" and includes an offer to pay the Employee "the equivalent of severance pay, only as a measure of unmerited goodwill".

16. In our opinion, all the points listed above are aspects of unreasonableness on the part of the Employer, which militate against any successful outcome in its favour.

17. Having carefully considered the evidence before us and compared the opposing closing submissions of Counsel, we are constrained to declare that the Employee was unfairly dismissed and is entitled to compensation, which we will assess below.

18. We note Mr. Marshall's submission that any award we make should be discounted on account of the Employee's contribution to his dismissal. However,

we reject that submission as there is no evidence before us on the basis of which we can make a finding that he is blameworthy.

Compensation

19. We award compensation under the established headings as follows:

Loss of Wages

- 1) We award the sum of **\$921.60**, being the equivalent of outstanding wages for the period March 15 to March 23, 2010

Notice Pay

- 2) We award the sum of **\$512.00**, being the equivalent of one week's wages.

Loss of Protection

- 3) Since the Employee worked from April 1, 2008 to March 23, 2010 (approximately 2 years) we award the sum of **\$2,457.60**, being the equivalent of 12 days' pay for each year of employment.

Immediate Loss

- 4) We note from his testimony that the Employee attempted to mitigate his loss but was handicapped by adverse comments from the Employer to potential new employers. However, we are not satisfied that his efforts were as diligent as they should have been. Accordingly, we limit his compensation to **\$11,093.35**, the equivalent of his full wages for the first 4 months immediately after his dismissal and 50% of that amount for the ensuing 2 months.

Order

20. For the reasons stated above, we order that:

The Employer shall pay the total sum of \$14,984.55 to the Employee as compensation for his unfair dismissal, no later than November 15, 2022.

Dated this ^{14th} day of October, 2022.



Charlesworth O.D. Brown
President

Samuel R. Aymer
Member

Dr. Hayden Thomas
Member

