

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO. 64 of 2015

BETWEEN:

RANDY WHYTE

Employee

and

ANTIGUA AND BARBUDA PORT AUTHORITY

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. St. Lawrence De Freitas

The Hon. Judith Dublin

President

Member

Member

Appearances:

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

Mr. Craig L. Jacas of Stapleton Chambers, Attorneys-at-Law for the Employer.

2016: October 10

2017: February 15

2022: August 12

JUDGMENT

Brown, P:

Background

1. The Employer, named in this Reference as it is commonly called, was established under section 3 of the Port Authority Act, Cap. 333, as the "Port Authority". It is charged with the operation of harbours in Antigua and Barbuda, including the port at the St. John's Deep Water Harbour in the Parish of St. John. Its activities are largely governed by the provisions of that Act as well as certain overarching provisions of the Customs (Control and Management) Act 2013.
2. On a day-to-day basis, there is inherently close collaboration between the Port and the Customs Department. The Employer is responsible for securing goods delivered into its custody as being imported into or intended to be exported out of



questioned at all over the period of two weeks immediately after the report was made against him.

9. The Employee also averred that when he was eventually questioned at the disciplinary meeting on July 10, 2015, he was told of the allegation against him that he had violated Port procedures. When given the opportunity to defend himself, he explained that while walking in the transit shed, he incidentally spotted the barrel with his brother's name. He explained that the barrel appeared to have been tampered with because the seal around the lid "was loose".
10. Further, the Employee stated that although he was aware of the presence and official position of Mr. Giles Gore, Senior Customs Inspector, who was only a few feet away, he did not report his observation to him. Instead, he personally went to investigate the situation by lifting the lid, looking inside the barrel, observing that "some items appeared to have been removed", and closing it back. In the Employee's view, since he did not break the seal and / or take anything from the barrel, he had done nothing wrong.
11. In the circumstances, the Employee contended that his dismissal on the basis of his violation of the Port procedures was not sufficiently serious to warrant his summary dismissal.
12. In making out his case of unfair dismissal, the Employee stated that he was never issued with a copy of the relevant Port procedures and that the same were not displayed on the premises. As a result, he was not aware of the procedure he had allegedly violated. In any event, he asserted that the alleged "violation of port procedures" was not one of the offences listed in the Disciplinary Code attached to the governing Collective Agreement.
13. Further, in reinforcing his claim of unfair dismissal, the Employee contended that the letter of dismissal did not state the precise reason for his dismissal as required by the Labour Code.
14. In its Memorandum of Defence. The Employer disputed the Employee's claim on the following grounds:
 - (a) As to the suspension without pay, the Employer determined that on December 22, 2014, while they were both on its premises, the Employee did accost and threaten his supervisor, Mr. Josiah, who reported the matter to the Police. Consequently, the Police conducted an independent investigation.

accordance with the pertinent statutory provisions. The evidentiary burden is on the Employer to prove that (a) it had a good factual basis for the reasons it assigned for the suspension and the dismissal, respectively, and (b) it acted reasonably in suspending and dismissing the Employee under the circumstances prevailing at the material times.

16. In our opinion, both Mr. Darwin Telemaque, the Port Manager and Mr. Giles Gore, Senior Customs Officer, were credible witnesses for the Employer. For obvious reasons, Mr. Telemaque was understandably the more passionate. His evidence was more expansive and instructive while that of Mr. Gore tended to be more clinical. On the other hand, we found the Employee to be generally more emotive and less reliable.
17. Having particular regard for the Employee's 17-year tenure and the nature and scope of the Employer's business, we carefully considered the written, oral and documentary evidence. For present purposes, it will suffice to summarize our core findings of fact as follows:
 - (a) On December 22, 2014, the Employee did accost his supervisor, Mr. Josiah, during which he threatened to inflict physical injuries upon him. Not surprisingly, Mr. Josiah took the threat seriously and reported it to the Police.
 - (b) At a disciplinary meeting convened on December 23, 2014, in the presence of Mr. Josiah and the investigating Police Officer, the Employee was given an opportunity to defend himself. After hearing his account of the incident and taking into account what was stated by Mr. Josiah and the Police Officer, the Employer determined that, in breach of its rules and regulations, the Employee had issued a threat of physical injury to his supervisor.
 - (c) Accordingly, by letter dated December 23, 2014, the Employee was suspended with immediate effect for "twenty (20) days" without pay and instructed to return to work on January 23, 2015. In effect, he was required to absent himself from work for a total of 30 days which was 2 days longer than the statutory limit of 4 weeks' "suspension" permitted under section B. 3 of the Labour Code.
 - (d) On June 25, 2015, while Senior Custom's Officer Gore was standing approximately 4 to 6 feet away, the Employee lifted the cover of a barrel in one of the Employer's Transit Shed and reached into it. He had no Release or other document in his possession or under his control which authorized or

evidence or witnesses” the Employer arbitrarily and unreasonably suspended the Employee. We do not agree.

20. It is clear to us that the Employer weighed the opposing accounts of the Employee and his supervisor in the balance. It considered the surrounding circumstances, including the preexisting strain in the relationship between the Employee and his supervisor. In that regard, the Employee testified that there was “some amount of malice” between himself and Mr. Josiah. In addition, the Employer took into consideration that the Employee appeared to have been angry in relation to an incident which transpired at the warehouse earlier on the same day. Further, it is clear that the Employer took into consideration the involvement of the Police.
21. Perhaps most importantly, the Employer was guided by its own assessment of the credibility of the Employee before concluding that “it was more probable than not that Mr. Josiah’s account of the incident was more likely to have been accurate”.
22. In the circumstances, it was not unreasonable for the Employer to conclude that the Employee had committed an act contrary to the “Port rules and regulations”. In fact, section 10 of the **Deep Water Harbour (Traffic and Security) Regulations, 1981**, provides that “**Within the Port no person shall ...swear or use abusive, threatening or indecent language**”. And under section 17, any person failing to comply with that regulation commits an offence and is liable, on summary conviction, to be penalized with a fine.
23. In the final analysis, given that the Employee’s typical work week was comprised of 5 working days, we find that the Employer had a good factual basis for the suspension, subject to the statutory limitation. As to reasonableness, the Employer would have been acting reasonably if it suspended the Employee for “twenty (20) days”, period. Reading that clause of the paragraph by itself, the suspension period, without more, would have been consistent with the statutory limit of “four weeks” established by section B 3 of the Labour Code, and would have expired on January 20, 2015, so that the Employee would have been entitled to return to work on January 21, 2015.
24. Understandably, Mr. Carty submitted that by instructing the Employee to return to work on January 23, 2015, the Employer was effectively suspending the Employee for 30 days, two more than the statutory limit. If he is correct, then the Employer’s action would have amounted to a breach of the Employee’s right not to be suspended for longer than four weeks.

dismissal. In the letter it is abundantly clear that the main plank of the Employer's claim of impropriety was that the Employee manipulated and opened the barrel which was not consigned to him, was not his property, and to which he had no legal right and for which he had no Release or other document authorizing him to do so without the presence of a supervising Customs Officer or at all.

31. Further, in relation to the letter of dismissal, it is clear that the Employer alleged that:

- (a) The Employee well knew that it was necessary for him or any other customer to obtain a Release document in order to access and take possession the barrel;
- (b) The Employee well knew the role of the Customs Officer to whom the Release should be presented after which the barrel would be opened by or in his presence, after which he would certify its contents.

32. In addition, in the letter of dismissal, the Employer asserted that the Employee admitted that;

- (a) he recognized but disregarded the presence and authority of Mr. Gore;
and
- (b) he knew and admitted that his actions were "illegal and wrong";

33. Ultimately, in the dismissal letter, the Employer stated its conclusion that the Employee's violation of the procedures was so serious that it had "no alternative but to terminate [his] services with immediate effect".

34. In his submissions, learned Counsel presented a cogent and persuasive argument that the Employer was justified in dismissing the Employee summarily pursuant to section C 59 (1) of the Labour Code which provides for the dismissal of an employee on the ground of serious misconduct such that the employer cannot reasonably be expected to take any other course. The types of misconduct envisioned under the subsection include those where the employee:

- (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 employment, without consent, express or implied, of the employer;..."**

committed, not a mere “procedural irregularity” as suggested by Mr. Gore, but serious criminal offences in that he:

- (a) Contravened or failed to comply with the conditions and/ or restrictions imposed by the Comptroller in respect of the handling of the barrel; and
- (b) Accessed the barrel and the goods therein without the authority of the Comptroller of Customs, Senior Inspector Giles Gore or any other proper officer, and without just and sufficient cause.

42. Moreover, the Employee’s misconduct, apart from apparently rendering him personally criminally liable, was diametrically opposed to the Employer’s own specific legal obligation, referred to at paragraphs 36 and 37 above, prohibiting it from the delivery of any goods without the “necessary authority”.

43. For the several reasons stated above, we are satisfied that the Employer has proved, as it was required to do, the factual basis for its conclusion that the Employee was guilty of serious misconduct.

44. As to the statutory test of reasonableness, we summarize some elements of reasonableness, as highlighted in Mr. Telemaque’s convincing testimony and the submissions of Counsel, as follows:

- (a) the Employee was acting outside the scope of his duties;
- (b) the conduct of the Employee was illegal as he had committed an offence which rendered him liable to criminal proceedings;
- (c) The area in which the illegality occurred was in effect a bonded warehouse subject to specific regulations as determined by the Comptroller of Customs;
- (d) the Employer convened a disciplinary meeting at which the Employee was accompanied by his Union Representative and told of the specific allegations against him;
- (e) the Employee was given the opportunity to defend himself while being represented by his Union in the presence of his Shop Steward, his supervisor and senior Customs Officer Gore who made the initial report against him;

48. In the circumstances, we order that the Employer do pay compensation to the Employee in the sum of \$1,938.74, for his unfair suspension, no later than September 17, 2022. And we make no order as to costs.

Dated this 12th August, 2022



A handwritten signature in black ink, appearing to be "C. Brown", written over a dotted line.

Charlesworth O. D. Brown
President

A handwritten signature in blue ink, appearing to be "St. Lawrence De Freitas", written over a dotted line.

St. Lawrence De Freitas
Member

A handwritten signature in black ink, appearing to be "Judith Dublin", written over a dotted line.

Judith Dublin
Member