

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/82 of 2017

BETWEEN:

BOBBY SIMPSON

Employee

And

MIDWAY STORAGE PARK LTD

PAUL BENNETT

Employer

Before:

The Hon. Charlesworth O.D. Brown

Megan Samuel Fields

President
Member

Appearances:

Mr. Anderson E. Carty of Antigua and Barbuda Tradesmen & United Workers'

Federation, Representative for the Employee

Mr. Anthony Greer of Greer & Associates, Attorney-at-Law for the Employer

2021: September 27

2022: January 24

September 23

JUDGMENT

Brown, P:

Introduction

1. In this Reference the Employee claims compensation for unfair dismissal in respect of the termination of his employment by letter dated August 4, 2016, after he was engaged in a fight on the job with his Supervisor, Jason Bowen.



2. In his Memorandum of Claim the Employee contends that he was unfairly dismissed contrary to the Antigua and Barbuda Labour Code (the Labour Code). The main grounds of his contention are:
- (a) he was not given a fair hearing
 - (b) did not receive a statement of termination, as required under the Labour Code.
 - (c) his Supervisor, with whom he was fighting, was not disciplined.

Factual Background

3. At all material times, the Employer carried on business under his trade name, Midway Storage Park from his premises at Clarkes Hill, All Saints Road in Antigua. He had his private residence at St. James Club, Mamora Bay.
4. On October 06, 2016, the parties signed an Employment Agreement whereby the Employee agreed to fixed term of employment "beginning May 01, 2016, for six months ending October 31, 2016, and thereafter renewable on a sixth monthly basis". In the Agreement, the Employee's responsibilities were stated as "garden maintenance, general maintenance, driving assisting with moves into and out of the storage park". Like his Supervisor and the Employer's Housekeeper, Ms. Nalini Instanali, the Employee's main workstation was at the Employer's residence. His wages were agreed at \$600.00 per week for "20-25 hours weekly on average".
5. The Employer allowed Mr. Bowen to use one of his business vehicles mainly for the purpose of getting around between the Storage Park and the Employer's private residence in the performance of his duties. The Employer did not provide any transportation for the Employee to get to and from work. However, by an agreement between them, Mr. Bowen agreed to transport the Employee and Ms. Instanali, to and from work in consideration of the payment of the sum of \$ 3.00

per day by each of them to Mr. Bowen towards the cost of fuel. The Employer approved the arrangement.

6. As at June 22, 2016 the Employer was overseas and the Employee was in arrears of payments to Mr. Bowen for a 3-month period. As a result, tensions developed between the Employee and his Supervisor. In the morning on that date, a heated exchange occurred between the Employee and Mr. Bowen while they were seated in the vehicle at the Storage Park in respect of the arrears owed. As a result, in an effort to get the Employee out of the vehicle, Mr. Bowen threw the Employee's knapsack, containing his cell phone and his lunch, out of the vehicle onto the ground. In retaliation, the Employee took up Mr. Bowen's cell phone from the seat in the vehicle. Eventually, while they were travelling to the residence, at the request of Ms. Instanali, the Mr. Bowen stopped the vehicle and the Employee got out, made his way back to the Storage Park and recovered his knapsack.

7. After recovering his knapsack, the Employee eventually reported to work at the Employer's residence where the altercation continued and escalated. During that exchange Mr. Bowen demanded that the Employee leave the premises. The Employee refused to comply as a result of which the altercation intensified.

8. Mr. Bowen then summoned his two brothers who also worked on the St. James' property. Upon their arrival the fight ensued with the Employee on the one side and Mr. Bowen and his two brothers on the other. Eventually, the police arrived on the scene and took away the Employee. He was detained at the police station for two days and then released without being charged with an offence.

9. After being released from police custody, the Employee contacted the Employer overseas by telephone. He was informed that his employment would be terminated for fighting on the job. His dismissal was confirmed in writing by the

Employer's letter dated August 4, 2016. The Employer stated that the termination was effected because the Employee "engaged in misconduct by fighting on July 22, 2016..."

Preliminary Application

10. At the threshold of trial, the Employee's Representative commenced an oral application under section C 10 of the Labour Code for an order that the Employer be estopped from introducing testimony as to the precise reason for the dismissal, which reason it had an obligation to recite in a letter of dismissal. The application was foreshadowed by the Employee's averment that the Employer failed to furnish him with a statement of termination as required by that section.

11. The resolution of that application would involve careful consideration of the evidence as to whether or not the letter of dismissal was delivered to the Employee. Since such a resolution would potentially lead to a mini-trial within the main trial, the Court directed that consideration of the application be deferred until all the evidence was before it.

12. In considering the preliminary application in light of the evidence, the following facts are most instructive:

- a) On the date of the fight, the Employer was out of the jurisdiction.
- b) The Employer subsequently had telephone conversations from overseas with Mr. Bowen and Ms. Instanali, on the basis of which he formed the opinion that the Employee was the aggressor and would be dismissed.
- c) When the Employee spoke to him overseas, after his release from police custody, the Employer gave him notice of his dismissal.
- d) The Employer returned to the island 4 or 5 days after the fight or 3 or 4 days after giving the Employee notice of his dismissal.

e) The Employee never returned to work after his release from police custody.

13. Section C 10 (1) of the Labour Code provides:

“Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for the termination.”

14. We find that after the fight occurred on July 22, 2016, the Employee spoke to the Employer by telephone after his release from police custody on July 24, 2016. According to the Employee, during the conversation, the Employer told him that he “was terminated for fighting on the job”. In the letter of termination, dated August 4, 2016, the Employer confirmed that during their conversation, he at least gave the Employee notice of his dismissal. Clearly, more than 7 days had elapsed between the date when the notice was given and the date of the letter.

15. In light of the evidence, the Employer has failed to prove that the Employee received the letter of dismissal. Accordingly, we conclude that the Employer did not furnish the Employee with a statement of termination within 7 days of receiving the notice of his dismissal, as required by law. Consequently, the Employer is estopped from relying on any of the facts stated in the dismissal letter as the precise reason for the dismissal.

16. In the circumstances, we are inclined to declare that the Employee was unfairly dismissed and is entitled to compensation. However, in the event that the Employee received the dismissal letter and our inclination is wrong, we will go on to consider the reasonableness of the dismissal.

17. In *Antigua and Barbuda*, fighting on the job is an offence frowned upon by virtually all employers. In several, if not all collective agreements, it is expressly punishable by dismissal. Even in the absence of express agreed terms, it is widely considered to be a form of misconduct which renders an employee liable to dismissal, subject to the relevant provisions of the Labour Code and the principles and practices of good industrial relations.

18. In this case, the Employer concluded that the Employee was the instigator and the aggressor. In particular, the Employer blamed the Employee for renewing the argument at the workplace and arming himself with a screwdriver which he used to attack one of the Supervisor's brothers. Moreover, the Employer also asserted that despite the efforts of security personnel to restrain him, the Employee continued with his bad behaviour to the extent that the police had to be called in to quell the commotion.

19. In *Ref. No. 11 of 2005: Caryle Anthony v BBR Sportive Ltd.*, the employee was summarily dismissed for fighting with her co-worker. This Court, as it was then constituted, was required to determine whether the employee was unfairly dismissed. To that end, it considered which of the two fighters was the aggressor and whether the employer carried out a proper investigation. In effect, the Court decided that fighting on the job was potentially a good cause for dismissal under section C 58 (1) and then applied the test of reasonableness under section C 58 (2) of the Labour Code.

20. In the end, taking into account all the circumstances, it was held that the employee was unfairly dismissed largely because she was not the aggressor and had been defending herself. However, it was also held that she contributed to her dismissal, as a result of which her compensation was reduced by 10%.

21. In resolving the issue of unfair dismissal now before us, we will follow the Court's approach in the **Anthony case** and ask ourselves the following questions in sequence:

(1) What is the genesis of the fight?

(2) Who was the aggressor?

(3) Was there a proper investigation?

(4) Was there a fair disciplinary hearing?

(5) Was there inconsistency in the treatment meted out to the fighters?

(6) Did the Employee contribute to his dismissal?

22. As to the genesis, it is clear that it was rooted in the personal arrangement between the Employee and Mr. Bowen. It was not work-related. Whatever the differences between them were, the situation took a turn for the worse when the Supervisor threw the Employee's knapsack out of the vehicle. That situation was converted into a serious work-related issue when the Employee later turned up for work, after retrieving his knapsack, and was told by his Supervisor to leave the work-place.

23. Given Mr. Bowen's obvious seniority, it is clear that the Employer vested in him the responsibility to supervise the works and maintain peace and order at the job site. In our view, that responsibility would require the Supervisor to de-escalate the situation or at least attempt to do so.

24. Taking all the exchanges into account, from the point when the vehicle left the Storage Park to when the Employee arrived at the job site, we are inclined to find that the Supervisor was the aggressor. He certainly did not even attempt to de-escalate the situation. That inclination is more acute when we take into account the fact that the Supervisor summoned his two brothers to provide him with

"back-up". He testified that: "I called my brothers to help me get Simpson off the property". Later, he said: "We threw him to the ground and held him down".

25. In the final analysis, we find that the Supervisor was the aggressor, at all material times. Thus, we hold him largely responsible for converting the subsisting personal issue with the Employee into an issue on the job. And he demonstrated no or no sufficient effort to de-escalate the situation. To the contrary, he actively fanned the flame.

26. As to the investigation, we find that the Employer's actions were inadequate. Firstly, while he was still overseas, he spoke to both the Supervisor and the Housekeeper in the absence of the Employee who was then still in police custody. When the Employee eventually called him, the Employer responded that he already knew about the incident and had decided to dismiss him.

27. In the ordinary course of things, the principles and practices of good industrial relations would require a reasonable employer to engage the Employee in a more meaningful way, say, by convening a meeting and giving the Employee an opportunity to confront his accusers and give his version of the incident. To make matters worse, the Employer obtained a written statement from Ms. Instanali and neither shared it with the Employee nor requested a similar statement from him and/ or Mr. Bowen. In the circumstances, we conclude that the investigation was incomplete, inadequate or one-sided. The entire investigative and disciplinary processes adopted by the Employer were fatally flawed.

28. It should be emphasized that each case turns on its own facts. In some cases, a full and proper investigation and a proper hearing are important. In some cases, they are neither here nor there. And in others, like the instant case, they are vital components of reasonableness.

32. As to the sixth question posed at paragraph 21 above, in addition to the foregoing conclusion, we also find that the Employer is blameworthy in that he contributed to his dismissal. In our opinion, his responses to Mr. Bowen's conduct should have been less confrontational. Overall, we assess his contribution at 10% as was done in the **Anthony case**

31. In conclusion, we find that by reason of the operation of section C 10 (4), the Employer has failed to prove that he had a good cause for the dismissal. And in any event, even if the fight constituted a potentially good cause, the Employer has failed the test of reasonableness. Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation.

30. As to the fifth question posed at paragraph 21 above, we have noted the clear disparity in the severity of the treatment meted out to the two employees. The Employee was dismissed while the Supervisor was suspended for two weeks. In our opinion, the inconsistency of the treatment is an indication of unreasonableness and otherwise contrary to the principles and practices of good industrial relations practices.

29. On our scorecard, the foregoing amount to "four strikes" against the Employer. Firstly, he must bear vicarious responsibility for allowing a private matter to be brought onto the workplace. Secondly, in relation to what happened at the workplace, the Employer is deemed to have been adopted the Supervisor's conduct as the aggressor. Thirdly, the Employer failed to conduct a proper investigation. And fourthly, the Employer failed to give the Employee a fair opportunity to state his defence.

Compensation

33. Subject to his duty to mitigate, the Employee's compensation is roughly the measure of his loss in relation to the unexpired portion of the 6-month fixed term contract. Accordingly, we award compensation under the headings of Payment in lieu of Notice, Loss of Protection from Unfair Dismissal and Immediate Loss of Earnings.

a) Notice Pay

We award the sum of **\$600.00**, being the equivalent of one week's pay.

b) Loss of Protection

The Employee was dismissed by letter dated August 4, 2016, after he had worked for 3 months with his contract scheduled to expire on October 31, 2016. In the circumstances, we award the sum of **\$360.00**, the equivalent of one day's pay for each month of employment.

c) Immediate Loss

Based on the Employee's sketchy evidence, we award the sum of \$3,000.00, the equivalent of his full wages for the 5 weeks immediately after his dismissal. Further, we award the additional sum of \$2,400.00 being one half of his pay for the ensuing 8 weeks. The total award under this heading is **\$5,400.00.**

34. The total net award to which the Employee is entitled is therefore **\$5,724.00** (\$6,360.00 less 10% reduction on account of his contribution to his dismissal).

Order

35. We order that the Employer do pay the sum of \$5,724.00 to the Employee, as compensation for his unfair dismissal, no later than October 21, 2022. And we make no order as to costs.

Dated this 23rd day of September 2022

A handwritten signature in black ink, appearing to be 'Charlesworth', written over a horizontal dotted line.

Charlesworth O.D. Brown

President

A handwritten signature in black ink, appearing to be 'Megan Samuel Fields', written over a horizontal dotted line.

Megan Samuel Fields

Member

