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ANTIGUA AND BARBUDA

Reference No: C/UD 95 of 2017

RODRICK ALDRIDGE

And

Employee

MILL REEF CLUB LTD

Employer

Before:

The Hon. Charlesworth O. D. Brown

President

The Hon. Samantha May Francis

Vice President

The Hon. John Benjamin

Member

Appearances:

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

Mr. Justin L. Simon, QC of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2022: March 21

July 8

JUDGMENT

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Brown, P:

Background Facts

1. The Employer carries on business under its well-known trade name, Mill Reef Club. In the process of providing hospitality services to its guests, it operates and maintains a golf course by reason of which it owns golf carts and employs attendants.
2. The Employee commenced his employment with the Employer as a Golf Course Attendant on October 8, 2007. In addition to the Antigua and Barbuda Labour Code (the Labour Code), his employment was governed by the Collective Agreement between the Employer and the Antigua & Barbuda Workers' Union.
3. The Employee's services were terminated on May 31, 2017, on the ground of gross misconduct. Prior to that date, he was paid wages at the weekly rate of \$734.00. In addition, he also received a 4-point share of the Employer's service charge fund.

4. One of the Employer's golf carts, referred to in these proceedings as the "Torro" cart, had a "fuse problem" caused by a defect in its electrical system which often caused it to malfunction. As a result, the Employee and his colleagues who used that cart often had to "play with the fuse or remove it and immediately place it back" into the fuse box to get the cart started.
5. On Saturday May 20, 2017, the Employee was assigned by his supervisor, Mr. Jerry Ralph, to be part of a team to prepare for a wedding ceremony on the premises later that day. They did the "set up" during their regular hours and were required to return to the premises at 11.00 pm to complete the assignment. An issue arose between the team and the Employer about the amount of payment the team members would receive for returning to dismantle the "set up" and storing away certain equipment. The team wanted \$250.00 per person while the Employer offered only \$150.00. The issue remained unresolved up to the end of the regular workday shift.
6. At approximately 3.00 pm when his shift ended the Employee parked the cart at its usual place in a shed, removed the fuse and hid it on one of the rafters in the shed.
7. At approximately 8.30 pm, Mr. David Fleming, Facility Manager, who was in charge of the set up went to the shed to get the Torro cart and found that the fuse had been removed. He reported the situation to Mr. Ralph who left home and returned to the premises to address the problem. In turn, he telephoned the Employee who directed him where to find the fuse. Once found, the fuse was reinserted into the fuse box and the cart eventually started.
8. On Monday May 22, 2017, a fact-finding meeting was convened by the Employer with the Golf Course team and three members of the management team. After explanations were given, the Employee admitted removing the fuse and absolved his colleagues from any wrong-doing. At the end of the meeting, the Human Resources Manager stated that further investigations would be carried out.
9. On May 29, 2017, the Employer completed its investigation and concluded that the Employee intentionally damaged the hotel property (the Torro golf cart), an offence specified in the Collective Agreement.
10. On May 31, 2017, having completed its investigation, the Employer convened another meeting to inform the attendees of the outcome of its investigations. The Employee was advised that his actions had negatively affected the Employer's confidence and trust in him and that it was clear that he had acted without any consideration for the company and

its operations. In the end, he was told that his services would be terminated on account of his grave misconduct. The letter of dismissal dated May 29, 2017 was delivered to him. Excerpts from the letter read;

“Through your actions you deliberately damaged the company’s golf cart when you removed the fuses, which resulted in impairing its value, usefulness, to the company and its operations.

...

Your actions on the afternoon of the 20th day of May 2017 interrupted the continuity of the work flow of the operations as even the replacement of the fuses caused a malfunctioning of the golf cart, and you were fully aware of the needs of the company to have access to the golf cart throughout the evening.

...

The company has taken time to further investigate and consider the matter, it is our view that your actions constitute grave misconduct and further the trust that must exist between employer and employee no longer exists. In accordance with section C59 (1) of the Antigua and Barbuda Labour Code and Schedule C #19 of the Antigua and Barbuda Workers’ Union Agreement, your employment is hereby terminated with immediate effect as at the 31st day of May 2017...”

Discussion

11. The familiar issue of unfair dismissal arises in respect of the Employer’s action in dismissing the Employee in response to the Employee’s alleged misconduct. In considering the nature and effect of the Employee’s conduct, two crucial questions must be answered: (a) Was the Employee guilty of misconduct which could potentially justify his dismissal, and (b) Was it reasonable for the Employer to dismiss the Employee under the circumstances?
12. Both questions must be answered within the legal framework of the Labour Code which introduced the statutory right of every employee not to be unfairly dismissed. Given the genesis of that right, the burden is on the Employer to prove that the dismissal was not unfair. Thus, on the balance of probability, the Employer must first prove the factual basis on which it concluded that the Employee was guilty of misconduct. In addition, it must also prove the reasonableness of its action in dismissing the Employee.

13. For present purposes, having regard to the common grounds outlined in the background facts above, it is convenient at this point to consider the closing submissions of the parties which focus more or less on various aspects of the written, oral and documentary evidence which are not in dispute.
14. Early in his submission, learned Counsel, Justin Simon QC, noted the Employee's tenure of almost 10 years. For his part, The Employee's Representative, Mr. Anderson Carty, noted that prior to the incident in question, the Employee had performed his job satisfactorily and that no disciplinary action had ever been taken against him before his dismissal. On behalf of the Employee, Mr. Carty also emphasized that his supervisor, Mr. Ralph, considered him to be a very good worker.
15. The nub of the Employer's complaint is that the Employee deliberately removed the fuse and hid it among the rafters, knowing that that action would deprive the Employer of the use of the cart for the desired purpose. In testifying on behalf of the Employer, we found Jerry Ralph to be a credible witness, so we accept his testimony to the effect that although the cart's fuse issue was well known among the staff, they never removed the fuse from the fuse box. Accordingly, we accept that the Employee's conduct was calculated. He attempted to deprive the Employer of the use of the cart for the desired purpose after he left the premises.
16. Ultimately, as events transpired, the Employee's pursuit of that objective was short-lived. When questioned by his supervisor, he hesitated briefly and then relented by admitting that he had removed the fuse and disclosing its whereabouts. However, his action had the effect of necessitating Mr. Ralph's return to the premises after regular work hours at approximately 9.00pm to ascertain the state of affairs and recover the fuse.
17. Learned Counsel intimated the Employer's acceptance of the fact that, contrary to what was asserted in the dismissal letter and repeated in its Memorandum of Defence, the removal of the fuse did not damage the cart and that the malfunctioning of the cart was not attributable to the Employee's removal of the fuse. Those significant concessions, which were made honourably in light of the evidence before us, had serious implications for and adversely affected the Employer's discharge of its evidentiary burden.
18. As we understand it, the early part of the letter of dismissal disclosed the concise assertions of fact that the Employee **"deliberately damaged the [Employer's] golf cart"** and had the consequential effect of **"impairing its value, usefulness to the [Employer] and its operations"**. Later in the letter of dismissal, the Employer further asserted that by his actions, the Employee **"interrupted the continuity of the workflow"**

of the operations” as the replacement of the fuses, resulting from the Employee’s conduct, **“caused a malfunctioning of the golf cart”**.

19. Further, it is our understanding that **the Employer’s conclusion that the Employee’s “actions constitute grave misconduct”** and destroyed the necessary **trust** between the parties were wholly grounded on the earlier allegations of fact. Needless to say, if the foundation fails, as Counsel has admitted, the house on which it is built is also likely to fail. Clearly, the Employer was in no position to sustain its position as asserted by its witness Daynor Dow, that the Employee had committed an offence specified as item 19 of Schedule C to the Collective Agreement: “Intentional damage to hotel property”. Moreover, in our opinion, since the gravity of the misconduct was admittedly much less than initially asserted by the Employer, it could not maintain that the dismissal was in accordance with section C 59 (1) of the Labour Code.
20. We have pointed out the challenges faced by the Employer in establishing the factual basis for the Employee’s “grave misconduct” which it assigned as the reason for his dismissal. In addition, we will now discuss briefly the reasonableness or unreasonableness of the Employer’s action in effecting the dismissal having regard to the surrounding circumstances.
21. As to the surrounding circumstances, it will suffice to highlight the following:
 - (a) Prior to May 20, 2017, the Employee had an unblemished record during his tenure.
 - (b) The Employer was well aware that the electrical system of the golf cart was defective which caused it to malfunction from time to time. Yet, it failed to fix the problem although it had a Mechanic on staff.
 - (c) When questioned as to the whereabouts of the fuse, the Employee did make a full disclosure of its whereabouts and subsequently accepted full and exclusive responsibility for his actions.
 - (d) On Monday May 22, 2017, upon his return to work, the Employee was required to use the same golf cart in the usual performance of his duties.
 - (e) After the meeting on May 22, 2017, the Employee was required to resume his duties pending the completion of the Employer’s investigation.
 - (f) After completing its investigation, the Employer’s management team met on May 29, 2017 and determined that the Employee was guilty of damaging the hotel property and would be liable to the sanction of dismissal.
 - (g) Sometime between May 29 and May 31, 2017, the Employee requested a job letter from the Human Resource Manager and was directed to complete the requisite form.
 - (h) The Employee was permitted to perform his duties up to May 31, 2017, an additional 8 days and 2 days respectively after the first and second meetings. During that period, he was given no update about the investigation.

(i) On May 31, 2017, the Employee was invited to another meeting at which the letter of dismissal dated May 29, 2017 was delivered to him.

22. We have noted Counsel's dexterity in that, having made the concessions, he refocuses on the issue of trust which he contends arose, in any event, from the Employee's actions in interrupting the continuity of the flow of the operations. On that point, we agree that there was some degree of interruption, but the same, in our view, should not have wholly destroyed the trust between the parties, although it could have subjected the relationship to some degree of manageable strain. Thus, we are not satisfied that the misconduct was so serious that a reasonable employer could not reasonably be expected to take any course other than termination. In our estimation, the Employer should have taken some other form of disciplinary action less severe than dismissal.
23. Having paid careful attention to the evidence as a whole, including the surrounding circumstances, we are inclined to favour Mr. Carty's opposing submission that the Employer has failed to prove that the dismissal was "reasonable and fair". Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation.
24. In the final analysis, we also find that the Employee is blameworthy in that he contributed to his dismissal. In assessing that blameworthiness, we fix his contribution at 20%. His compensation will be reduced accordingly.

Compensation

25. In the circumstances, we award compensation as follows:

Notice Pay

We award the sum of \$734.00, the equivalent of one week's pay, under this heading.

Basic Award

The amount under this heading is the equivalent of severance pay calculated in accordance with the rates in the Collective Agreement. Contrary to the rates asserted by Mr. Carty, we have ascertained that the applicable rates are: 14 days per year for the first 3 years of service; 16 days for years 4 to 8; and 22 days for over 8 years of service. The Employee worked a total of 9 years and 7 months. Accordingly, **we award the sum of \$23,012.37 $\{(14 \times 3 \times \$146.8) + (16 \times 5 \times \$146.80) + (1.58 \times 22 \times \$146.80)\}$ under this heading.**

Immediate Loss

Initially, the Employee took reasonable steps to mitigate his loss. Starting from August 2017 up to April 2020, he earned \$440.00 per week from one employer working at night. In addition, in September and October 2017 he earned \$480.00 per week from another employer working in the mornings. In the circumstances, **we award the sum of \$6,361.33, the equivalent of his former wages for the first 2 months immediately after his dismissal.** In addition, **we also award the sum of \$7,644.00, being the difference between his former and his new wages from his night job for the ensuing 6 months.**

Fringe Benefits

As to fringe benefits, in reliance on the evidence of Mr. Ralph, we find that the service charge varied significantly between the peak of the season and the slow season. In the circumstances, we fix the Employee's average share of the service charge at \$500.00 and \$250.00 respectively for the peak and slow season. Accordingly, **we award the sum of \$1,500.00 for the first 6 months immediately after his dismissal and the additional sum of \$1,000.00 for the ensuing 2 months.**

Thrift Fund

Although the Employee included no claim under this heading, we note that the documentary evidence discloses that the Employee was paid only his contribution to the Thrift Fund. Having regard to the relevant clauses of the Collective Agreement, the Employer was required to contribute the equivalent of 6% of the Employee's salary. Upon summary dismissal, the Employee became entitled to his contribution only. However, having regard to our finding of unfair dismissal, we further declare that the Employee is also entitled to the Employer's contribution paid on his behalf up to the date of his dismissal.

Conclusion and Order

26. In the premises, in addition to the Employer's contribution to the thrift fund, the Employee is entitled to the sum of \$40,251.70 as compensation for his unfair dismissal. That sum is reduced by 20% to \$32,201.36 on account of his contribution to his dismissal.

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

- (1) The Employer do pay the net sum of \$32,201.36 to the Employee as compensation for his unfair dismissal, no later than August 14, 2022.
- (2) The Employer do immediately authorize the Eastern Caribbean Amalgamated Bank, formerly the Bank of Nova Scotia, or such other financial institution

holding the relevant trust fund account, to release to the Employee the full amount of the Employer's contribution that had been paid into the account on behalf of the Employee up to May 31, 2017.

(3) There shall be no order as to costs.

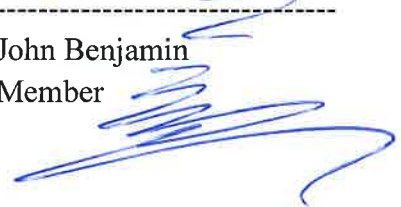
Dated this 08 day of July 2022



Charlesworth O. D. Brown
President

Samantha May Francis
Vice President

John Benjamin
Member

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO.C/ 95 OF 2017

BETWEEN:

RODRICK ALDRIDGE

Employee

and

MILL REEF CLUB

Employer

JUDGMENT

Hon. Charlesworth O.D. Brown, President
Hon. Samantha May-Francis, Vice President
Hon. John Benjamin, Member