

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 32 of 2019



BETWEEN:

Jael Baird

Employee

And

PLATINUM ACCOUNTING CONSULTANT & COACHING SERVICES INC

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John Benjamin

Member

Appearances:

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

Mr. Craig Jacas and Ms. Talia DeCosta of Stapleton Chambers, Attorneys-at-Law for the Employer

2022: October 25

2023: March 17

JUDGMENT

Brown, P:

Introduction

1. The Employer was established under the Laws of Antigua and Barbuda with its principal place of business situate at Suite #204 Village Walk, Friars Hill Road. It is engaged in businesses of providing accounting, auditing and other financial services to local, Caribbean and international businesses. At all material times, Ms. Sandra Baptist was its Chief Executive Officer.
2. After a year of on-the-job training by the Employer under the government's New Work Experience Programme, the Employee commenced her employment with the Employer on September 1, 2016 as a Junior Auditor Assistant. Immediately

before her dismissal by letter dated September 5, 2018, she was paid a monthly salary of \$3,000.00 and a Travel Allowance of \$200.00.

Overview of Opposing Cases

3. We outline the Employee's case as follows:

- a. On August 08, 2018 the Employee returned to work after a brief period of sick leave to find Ms. Shandi Biondo, an External Consultant (who appears to be caucasian by ethnicity) temporarily employed as such by the Employer, sitting at her desk. All the files which were previously on the Employee's desk had been removed. And Ms. Biondo directed her to sit at another desk and subsequently delivered a bundle of files to her.
- b. On one occasion, in response to the Employee's failure to make eye contact with her, Ms. Biondo stated: "I am speaking to you! Look at me! I am your senior!" The Employee replied in terms to the effect that Ms. Biondo was not her boss since her engagement as an External Consultant was on a temporary basis to assist with auditing.
- c. On several occasions Ms. Biondo spoke to the employee in a "disrespectful, condescending and aggressive manner" and acted in a provocative manner with the intention to frustrate and annoy the Employee. As a result, a dysfunctional conflict developed, of which the Employer was aware but did nothing to resolve.
- d. On August 20, 2018, while Ms. Baptist was overseas, Ms. Biondo "repeatedly shadowed" the Employee and spoke and acted as aforesaid. As a result of the treatment meted out to her, the Employee retorted that slavery had been abolished a long time ago so Ms. Biondo should get off her back.
- e. Ms. Baptist considered the Employee's statement to be racially inappropriate and warned the Employee by WhatsApp text message from overseas that the Employer would be demanding her resignation upon her return to office.
- f. On September 04, 2018 the Employer convened a meeting with the Employee and demanded that she apologize to Ms. Biondo for the inappropriate statements made to her over the previous few weeks.
- g. Upon her refusal to apologize the Employee was sent home. Her employment was terminated when she reported for work the following day, September 05, 2018.

- h. In the circumstances, the dismissal of the Employee was harsh and oppressive and contrary to good industrial relations practices. And she is entitled to compensation for unfair dismissal.
4. The Employer disputes the Employee's claim on the following grounds:
- a) While the office was merely rearranged, the files were not removed from the Employee's desk.
 - b) The Employee was specifically instructed by the Employer to report directly to Ms. Biondo on all audit matters.
 - c) Contrary to instructions received from Ms. Baptist, the Employee continuously refused to sit at the desk assigned to her.
 - d) The Employee failed to carry out or complete tasks as instructed by Ms. Biondo.
 - e) The Employee's statement regarding slavery, made in the absence of Ms. Baptist, was a direct response to Ms. Biondo's reasonable request for an update on work she was required to perform. The Employee refused or was reluctant to comply with the request.
 - f) Upon her return to office on September 03, 2018, Ms. Baptist requested that the Employee apologize to Ms. Biondo for her racist remark about slavery, which the Employer considered to be gross misconduct. Upon the Employee's refusal to apologize, the Employer scheduled a meeting for the following day with a view to reduce the strain in the work relationship between the Employee and Ms. Biondo.
 - g) The reasons for the Employee's dismissal include her unprofessional behaviour, failure to comply with the instructions of her superior, gross misconduct, insubordination and inappropriate use of the company's assets.
 - h) The dismissal was in accordance with sections C 58 and C 59 of the Antigua and Barbuda Labour Code (the Labour Code). The misconduct of the Employee was so serious that the Employer could not reasonably be expected to take any course other than dismissal.
 - i) In the circumstances, the Employee was not unfairly dismissed and her claim should be dismissed.

Analysis

5. As stated by the Employee at the commencement of these proceedings, the main issue in dispute between the parties is whether or not the Employee was unfairly dismissed. In cases like this where, a dismissal letter was issued, the burden is on the Employer to prove that it meets the requirements of Section C 58 (1) and C 58 (2) of the Labour Code in that (a) it had a good reason with a sound factual basis for the dismissal, and (b) it acted reasonably in dismissing the Employee.
6. As to the reason or the main reason for the dismissal, in accordance with Section C (10) it or they must be stated precisely in the dismissal letter. If there are two or more reasons, the Employer must establish the main reason.
7. As to the reason or reasons for the dismissal under Section C 58 (1) it is useful to reproduce the key parts of the dismissal letter as follow:

"5, September 2018

Dear Ms. Baird

...

Subject: Termination Letter

This letter is to inform you that your employment with Platinum Accounting Consulting and Coaching Services (PACCS) Inc. will end effective immediately as of September 5th, 2018 based on Section C 59 (a) of the Antigua & Barbuda Labour Code where you have conducted yourself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue. This decision is not reversible.

The company has decided to terminate your employment for these reasons:

1. **Unprofessional Behaviour-** relevant to August 8th, 2018; I have made it very clear both in writing (via WhatsApp to you) and verbally at the meeting I held with you and Ms. Shandi Biondo, that I rearranged the placement of desks in the office on Friday, August 3rd 2018 to reflect the flow of work and new department structure. It was clearly communicated that Shandi will sit at the desk closest to the storeroom and you acknowledged. From the following work day, you disobeyed my instructions and refused to sit at the desk that was assigned to you and communicated in the meeting causing disruption to the flow of work and smooth advancement of open projects.

Your behaviour towards Shandi is unacceptable, disrespectful, rude and insulting, including saying to her that *"you have one boss", "you do not report to her", "she has no right to be giving her work", "get out of my face", "leave me alone"*. When asked if you made these statements you confirmed you did. This behaviour is unacceptable and cannot be tolerated from any employee of this company.

2. **Failure to comply with instructions of your supervisor.** In our meeting on August 8, 2018, I explained to you that Shandi was engaged in temporary consulting capacity in the role of Audit Senior and is responsible for oversight of all audit work at PACCS as we prepare for our audit review. Therefore, effective immediately August 8, 2018, your reporting responsibility will be directly to her on ALL audit matters, unless otherwise instructed by me. In the expected course of carrying out her duties, Shandi sent you numerous emails which I was copied on during the period I was out of office, requesting updates and follow ups on open client jobs. To date, you have not responded to any those emails. Therefore, client work has been delayed, deadlines missed, work has not been done to and the established standards of PACCS as you failed to communicate and asked for guidance from the Audit Senior. Over the few days on my return to island Shandi and I have had to complete tasks that you should have completed and redo tasks that were not done to the standards of the company because you refused to follow my instructions of working with Shandi or seek her guidance on all Audit matters.
3. **Gross Misconduct-** On August 20, 2018, while I was off island, Ms. Shandi Biondi asked you to let her know when you are finished with a client file and she was told : *"slavery was abolished a long time ago, come off my back Shandi"*. This you confirmed saying to me via WhatsApp message that same day. This statement is racial, inappropriate and considered as gross misconduct on your part. PACCS is equal opportunity employer and will not tolerate racial biases or condemnation from employee towards a fellow employee.
4. **Inappropriate use of company assets-** On September 1, 2018, I went into the office and took up the company laptop assigned to you for working. Upon opening the laptop despite company policy, I was shocked to find that they are numerous web

searches and documents unrelated to PACCS but related to your own personal business, including : Pandora Catering Events (your business) ; web searchers for 'crack addiction' etc. This is a gross misuse of Company property and ethical concern for an accounting firm.

5. **Insubordination-** On my return to office on Tuesday, September 4, 2018, I walked into my office and saw you sitting at the Executive desk, and I asked *"why are you sitting here"*? After no response, I repeated my question. Your response was, *"I'm not sitting over there with Shandi"*. I then told you to come over to my desk and let's have a discussion. I told you that we are trying to organize the office and ensure that the office is compliant (with ACCA rules and regulations). I shared that your behaviour comments were inappropriate to Shandi over the past weeks and requested you to apologize to her, so we can move forward. You interrupted me and said that you are not going to apologize to Shandi. I repeated that you should apologize to Shandi or I will have to send you home for refusing to carry out a reasonable request from your employer. You refused to apologize, and you were sent home about 9:30am. You returned to work today, September 5, 2018.

..."

8. At first blush, it is evident that the nub of the Employer's position is that the Employee was guilty of serious misconduct which entitled it to dismiss her in accordance with section C 59 (1) (a). The opening paragraph of the dismissal letter, as quoted above, leaves no doubt in that regard.
9. The Employer listed 5 reasons, only one of which it labelled as "gross misconduct". That categorization is clearly in relation to words spoken by the Employee to Ms. Biondo which the Employer considered to be in the category of "racial biases and condemnation".
10. Apart from the reason of "gross misconduct", the three other reasons of "unprofessional behaviour" "failure to comply with instructions", and "insubordination" all involve or relate to the Employee's interactions with Ms. Biondo. The Fifth reason, "inappropriate use of company assets", involves the use of the Employer's computer to carry out web searches and store documents relating to the Employee's personal business.

11. The Employer's opening gambit in its letter of dismissal is that the dismissal is based on Section C 59 (1) (a) of the Labour Code. In effect, the Employer is asserting that the Employee's misconduct, which occurred on August 20, 2018, was "so serious" that it could not have been reasonably "expected to take any course other than termination".
12. The evidence clearly discloses that the Employer had five potentially good reasons for dismissing the Employee. Accordingly, having regard to the provisions of section C 58 (2), our focus going forward will be on the reasonableness of the Employer's action in dismissing the Employee under the then prevailing circumstances.
13. The Employer's primary reliance on Section C 59 (1) (a) may be unsustainable to the extent that it sought to support the alleged gross misconduct with the subsequent "inappropriate use of company's assets" on September 1, 2018 and the "insubordination" on September 4, 2018.
14. Perhaps more significantly, we note the circumstances surrounding the Employer's handling of the alleged gross misconduct which occurred on August 20, 2018 while Ms. Baptist was overseas. Prior to that date, the Employer issued a warning letter dated August 8, 2018 in respect of the Employee's failure to report to or take instructions from Ms. Biondo. That warning letter was apparently issued by Ms. Baptist via email based largely on what was reported to her by Ms. Bondi. As we understand the situation at that time, the Employee's response to the warning letter influenced the Employer to withdraw it.
15. There is no evidence that the Employer conducted an investigation in respect of the matters which happened or culminated on August 8, 2018. However, matters appear to have settled down to the extent that by email to the Employee dated August 09, 2018, Ms. Baptist stated: "I expect better from you. I spoke to Shandi yesterday as well so I'm expecting both of you to work professionally." Notwithstanding those placating words, the strained relationship between the Employee and Ms. Biondo subsisted until August 20, 2018.
16. On August 20, 2018, while the CEO was again overseas, a further confrontation occurred between the Employee and Ms. Biondo. During that interaction, the Employee said to Ms. Biondo "...slavery was abolished a long time ago, come off my back...". Having received a report of those words spoken by the Employee, Ms. Baptist, during a WhatsApp exchange with the Employee, stated "I'm going to have to ask for your resignation on my return, for your attitude."

17. In response to Ms. Baptist's WhatsApp message, the Employee complained to her about Ms. Biondo's manner of speaking to her. The transcript of a selected part of the exchange between the Employee and Ms. Baptist is as follows:

" 8/20/18, 4:00pm- Sandra Baptist: Jael what did you just say to Shandi about slavery??!!

8/20/18, 4:01pm - Jael Baird: I told her slavery was abolished a long time ago.

8/20/18, 4:02pm- Sandra Baptist: You think that's an acceptable response.

8/20/18, 4:02pm- Sandra Baptist: This is the final time I am speaking to you Jael. You are not professional. I am going to have to ask for your resignation on my return. Fix your attitude.

8/20/18, 4:07pm- Jael Baird: The way she is speaking to me is not acceptable Mrs. Baptist. I have been trying to complete this file from since morning. She kept on checking in for updates every minute. I completed the file around 3. I'm now on DPT. She's back again with the same attitude.

8/20/2018, 4:07pm - Sandra Baptist: I told her I want updates every hour

8/20/2018, 4:08pm- Sandra Baptist: Fix your attitude!!!! She's here to work

8/20/2018, 4:08pm- Jael Baird: Oh wow! So the way she's talking to me is acceptable ms Baptist?

8/20/18, 4:08pm- Sandra Baptist: Jael this is your final chance!! Fix. Your. Attitude.

18. The foregoing exchange suggests that the Employer was convinced that the source of the tension between the Employee and Ms. Biondo was the Employee's bad or negative attitude. In the eyes of the Employer, the Employee's attitude needed to be fixed. Ms. Baptist seemed to be totally ignoring the Employee's complaint about Ms. Biondo's attitude as the primary cause or a significant contributing factor to the bad relationship. In our estimation, it may be fair to say that the Employer was not handling the situation in a balanced or impartial manner.
19. It is noteworthy that, in what we consider to be the Employee's continuing "cri de coeur" (cry from the heart), she wrote to the Employer by email dated August 22, 2018 in the following terms:

"Hi Ms. Baptist,

I am trying to work with Shandi in the most professional way possible but she keeps talking to me in a manner that does not allow for a cordial working relationship.

What have been happening in this office for the last couple of weeks are some series of events that I have never seen or witnessed in any other work environment. I am appalled.

The way Shandi speaks to me Everyday is disrespectful, her tone, her demeanor, the way she looks at me. This is victimization. This morning she approached me at around 9:00 o'clock for an update, I told her that I am working between DPT and the WEZMEZ File. 30 minutes after she sent out an email about the same files I just gave her an update about.

Half an hour later she's back again with some papers pertaining to Joe mikes while explaining she says, "I will never respect you if you continue talking to me in this manner. When you give respect you get respect."

In Addition when she come around for an update she comes over my back and looks through the file that Im working on. She's always in your face personal, like im an examination room. This is Victimization.

My Question to you Ms. Baptist is Have I been a person that has not been doing my work well or performing well?

...

With the Joe mikes file i am unsure as to what to do. She showed me the templates on dropbox for the leadsheets but she never showed me how to do them or where I'm getting the figures from. I am very confused.

Thanks,

Jael"

20. Ms. Baptist responded to that email with a short one-liner: "Okay thanks. I note your concerns. We will discuss upon my return".
21. The exchange of messages paint a picture of a bad situation requiring the Employer's serious attention to avert the continuation of the stained relationship between the Employee and Ms. Biondo. We surmise that at this point, it was reasonable for the Employee to form a reasonable expectation that the Employer would undertake a full and proper investigation as to the relationship between its two employees, its genesis and the apportionment of blame between them. On the facts of this case, procedural fairness was paramount with both the Employee

and Ms. Biondo being entitled to face each other as cross-accusers and be given the opportunity to defend themselves. In our opinion, no less was expected of the Employer in its pursuit of natural justice and the principles and practices of good industrial relations.

22. In the circumstances, based on the third stated reason for the dismissal, it is easy to discern that the Employer had a narrow and perhaps a one-sided perspective: In pursuance of its apparent zero tolerance for "racial" statements at its workplace, it appears to have rushed an unsafe conclusion that the Employee's statement was inappropriate and amounted to gross misconduct.
23. Thus, from the Employer's perspective, having been found guilty of uttering the taboo "racial" statement, the Employee then became liable to be summarily dismissed. But her fate hung in the balance, presumably, pending her compliance with Ms. Baptist's demand for an apology, which demand came when she returned to office on September 3, 2018. The Employee refused to apologize.
24. Up to this stage in our sequential analysis of the events leading to the dismissal, we were strongly inclined to conclude that the Employer acted unreasonably, in the circumstances. Our final conclusion is largely influenced by the ensuing events. As it turned out, on September 4, 2018, the Employee was found guilty of "insubordination" for refusing to comply with Ms. Baptist's instruction in the form of a "reasonable request" that she apologize to Shandi. In our opinion, the request - coming at the time it did and having regard to all the surrounding circumstances - was unreasonable. Moreover, the Employer's reliance on its conclusion of the Employee's guilt of "insubordination" was similarly unreasonable.
25. The Employer's unreasonableness became even more striking when, on September 4, 2018, in light of the Employee's stance, it consulted with its Human Resources consultants and concluded that the Employee's misconduct and refusal to apologize were "egregious enough to warrant termination." Having come to that conclusion, the Employer scheduled a meeting for 4.00 pm the following day and required the Employee to attend. The Employee's consistent response, almost immediately after being so notified on September 5, 2018 was: "Ok. Will Shandi be present at this meeting, because Shandi needs to be there"
26. In our view, the Employee's request and assertion were reasonable in light of her earlier exchange of messages with Ms. Baptist. Thereafter, in the absence of any assurance that Ms. Biondo would be present, the Employee refused to attend the meeting despite Ms. Baptiste's request for her to do so. In any event, it is

noteworthy that the Employee's refusal to attend the meeting on September 5 was not and could not have been relied on by the Employer as it was not recited in the dismissal letter, the same having been prepared in advance of the scheduled meeting.

27. As a result of the Employee's continuing stance, the dismissal letter was delivered to her, and she was escorted off the premises by a police officer from the Criminal Investigations Department. In the absence of any explanation as to why the officer was present on the premises, and /or escorted the Employee out of the building, we are further inclined to conclude that that action by the Employer was a further element of unreasonableness.
28. As to the inappropriate use of company assets, described as "gross misuse" which the Employer discovered on September 1, 2018, there is no evidence that the Employee was confronted in that regard. Clearly, she had no opportunity to respond to this particular allegation against her. In any event, the duration of the alleged misuse could not reasonably be considered to be "the last straw" such as to warrant or justify the extreme disciplinary action of dismissal.
29. In the premises, we conclude that the primary reason for the dismissal was the alleged misconduct of the Employee which occurred on August 20, 2018. The Employee's refusal to apologize in the face of the direct request from Ms. Baptist on September 4, 2018, although related, was clearly secondary and carried much less weight.
30. In the final analysis, having regard to the several elements of unreasonableness on the part of the Employer, we are constrained to find that it failed the test of reasonableness established under section C 58 (2) of the Labour Code. Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation which we will assess below.

Compensation

31. We do not agree with Mr. Carty's acknowledged period of apprenticeship should be counted as part of her tenure with the employer. Her employment commenced on September 1, 2016 and ended on September 5, 2018, a period of two years. Accordingly, we award the following amounts under the respective headings:
 - a. Notice Pay

We award the sum of \$3,000.00, the equivalent of her former monthly salary under this heading.

b. Loss of Protection

We award the sum of \$6,000.00, the equivalent of one month's salary for each year of service under this heading.

c. Immediate Loss

Under this heading we award the equivalent of her full former salary for four months in addition to one half of the same for an additional two months making a total sum of \$15,000.00 or the equivalent of five months' salary.

d. Fringe Benefits

We award the sum of \$1,000.00, being the equivalent of 5 months' allowances under this heading.

e. Outstanding Salary

In accordance with the Employer's acknowledgement, we also award the sum of \$415.38, representing 3 days' outstanding salary.

32. We reject the Employer's flawed calculations of the amounts paid as "Severance" and Notice Pay as part of the "compensation package" paid to the Employee at the time of her dismissal. We also reject the Employee's claims for vacation pay adjustment, exemplary damages and costs as submitted by Mr. Carty and make no further award under any of the other established headings usually considered by this Court on an assessment.

33. At the end of the day, taking into account the amount previously paid to the Employee, the total amount of \$25,415.38 assessed above must be reduced by \$4,415.33 to \$21,005.05, the net amount due and payable to the Employee.

34. Finally, we acknowledge the closing submissions of both Learned Counsel, Ms. DaCosta and learned Representative, Mr. Carty. Having easily distinguished the case of **Oriel Walter v Photogenesis Imaging Solutions**, on which the Employer relied, we find the latter submissions more convincing.

35. And it is hereby ordered that:

1. The Employer shall pay the total sum of \$21,005.05 to the Employee no later than April 21, 2023, as compensation for her unfair dismissal.

2. Each party shall bear its own costs.

Dated this 17th day of March 2023



Charlesworth O.D. Brown
President



John H. R. Benjamin
Member



