

ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMEBER

.....

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD 34 of 2015

BETWEEN:

ADLYNNE MARTIN

Employee

And

CARIBBEAN FAMILY PLANNING AFFILIATION (CFPA)

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence DeFreitas

Member

Appearances:

Mr. Samuel A. James and Mr. Simon Leonard of the Antigua and Barbuda Free Trade Union, Representatives for the Employee

Mr. Clement E. M. Bird of The Bird Law Firm, Inc. Solicitors for the Employer

2017: May 23

2018: April 13

2023: July 24

Employee admitting misconduct by hacking Employer's secure email account - Employment relationship subsequently affirmed - Employer raising other concerns relating to the Employee's performance and other misconduct - Employee dismissed summarily upon her return from sick-leave five months after discovery of breach of the email system - Whether dismissal unfair

.....

JUDGMENT



ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD 34 of 2015



BETWEEN:

ADLYNNE MARTIN

Employee

And

CARIBBEAN FAMILY PLANNING AFFILIATION (CFPA)

Employer

Before:

The Hon. Samuel Aymer

Chairman

The Hon. Dr. Hayden Thomas

Member

The Hon. St. Lawrence DeFreitas

Member

Appearances:

Mr. Samuel A. James and Mr. Simon Leonard of the Antigua and Barbuda Free Trade Union, Representatives for the Employee

Mr. Clement E. M. Bird of The Bird Law Firm, Inc. Solicitors for the Employer

2017: May 23

2018: April 13

2023: July 24

Employee admitting misconduct by hacking Employer's secure email account – Employment relationship subsequently affirmed – Employer raising other concerns relating to the Employee's performance and other misconduct – Employee dismissed summarily upon her return from sick-leave five months after discovery of breach of the email system – Whether dismissal unfair

.....
JUDGMENT

Background

1. The Employer is a member of the International Planned Parenthood Federation with its headquarters in London, England. As one of a regional 13 member Association bearing the same name, it is devoted to the family planning of sexual and reproductive health in the Caribbean. The umbrella Association supports its members by providing them with technical assistance and representing their collective interests regionally and internationally.

2. The Employee commenced her employment with the Employer as Secretary on January 6, 1997. Subsequently she held the position of Administrative Officer from October 1, 2013 up to the date of her dismissal on May 19, 2014, at which time she was earning a monthly salary of \$3,500.00.
3. By her lengthy Memorandum of Claim comprised of 100 paragraphs, filed on June 30, 2015, the Employee admitted that she was guilty of the misconduct of hacking into the Employer's email but averred that, having regard to subsequent events, that misconduct did not warrant summary dismissal. Further, she contended that her misconduct was used as a "smoke screen" to hide the Employers true motive for dismissing her. Ultimately the Employee contended that her dismissal was harsh, oppressive and unlawful.
4. The Employer disputed the Employee's Claim. In its short Memorandum of Defence comprised of only 4 paragraphs filed on August 14, 2015, it averred that it had good cause for dismissing the Employee. In particular it maintained that, as admitted by her, the Employee effected a wholly unauthorized access to the Employer's secure email account, and reviewed and retrieved confidential information to which she was not entitled. Moreover, the Employer contended that after, its investigations, it provided the Employee with an opportunity to be heard and thereafter, concluded that there was no justification whatsoever for the Employee's conduct which amounted to gross misconduct. Accordingly, the Employer contended that the said Employee's misconduct resulted in an irrevocable break down of the fiduciary relationship between them and warranted her dismissal.

Discussion

5. The dismissal letter dated May 19, 2014, signed by Mr. Adler Bynoe, the Employer's CEO reads:

"Dear Ms. Martin

Re: Termination of Employment, For Cause

Following upon investigations conducted by the undersigned and the Board of Directors, we advise that your employment has been terminated with immediate effect for cause, pursuant to Clauses (sic) C56, C58 & C59 of the Labour Code, and in accordance with your Conditions of Employment, Section 10.5

It has been established (and formally acknowledged by you) that during my absence from office on vacation, you took the unilateral, unauthorized, extraordinary and wholly unjustifiable decision to 'hack' into my/the Affiliation's secure email account.

Having confronted you with this evidence, you made certain unsubstantiated and unfounded allegations which the Affiliation does not care to dignify repeating.

That having been said, after several attempts to have these documented, you have reduced same to writing, and these have been considered, reviewed, rejected as irrelevant to the core, central issue of your unauthorized and unlawful access to private, confidential and secured email accounts of the Affiliation's Chief Executive Officer.

Additionally, you were provided with and did take the opportunity to present your explanations in person, subsequent to which we remain of the view that there was no justification for your actions, which have shattered the fiduciary relationship of trust and confidence required for you to have continued in our employment.

Your actions amounted to gross misconduct of such nature that has left us with no other option.

We further note that you have been utterly unapologetic for said actions, which puts us on notice that even in the event we had taken an extraordinary position to overlook your actions, there would be no absolute guarantee- far less comfort- that you would not repeat same, to potential greater ramification and damage.

You are required to hand over all items that are deemed to be the property of the CFPA including, but not limited to, all office keys, cheque books, correspondence, files, etc, related to your work in the CFPA.

Once all the abovementioned matters have been fulfilled, your final outstanding vacation entitlement (to be established) will be made out to you,

..."

6. As to what constitutes a good cause for dismissal, Section C 58 (1) of the Antigua and Barbuda Labour Code (the Labour Code) provides:

"A dismissal shall not be unfair if the reason assigned by the employer therefor

"(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

(b) ...

...

Provided, however, that there is a factual basis for the assigned reason"

7. Section C 59 (1) provides:

"An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employer so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

..."

8. Apart from the requirement for just cause under Section C 58 (1), the determination as to what constitutes an unfair dismissal requires the application of the test of reasonableness as provided in Section C58(2) of the Labour Code as follows:

"The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

9. We surmise that the brevity of the Employer's Memorandum of Defence, in the face of the Employee's lengthy Memorandum of Claim, signifies its contention that its stance was firmly grounded in both the Labour Code and the Employer's policies. As we understand it, the Employer's position is that it was not necessary to specifically traverse or dispute the Employee's several other averments.

10. Naturally, in accordance with Section C 58 (1) of the Labour Code, the reason assigned for the dismissal must be substantiated by facts recited in the dismissal letter and adequately proved at the trial testing the fairness of the dismissal.

11. The Employee's acknowledgment of wrong-doing, as mentioned in the dismissal letter, is repeatedly confirmed in her Memorandum and Witness Statement. Thus, at first blush, it appears that the Employer was of the view that it was on good ground in contending that the dismissal was not unfair in so far as the Employee was guilty of serious misconduct. In our opinion, the Employer was being short-sighted in that it focused only on the requirement of section C 58 (1) without considering the conjoint effect of section C 58 (2).
12. On several occasions over the years, this Court has determined matters of unfair dismissal under Section C 58 of the Labour Code. The conjoint effect of subsections C 58 (1) and C 58 (2) were clearly demonstrated in **Reference No. 54 of 2013: Humphrey Michael Blackburn v. LIAT (1974) Ltd** and **Reference No. 66 of 2015 Antigua and Barbuda Workers Union v. Cable & Wireless (Antigua) Ltd**. The settled approach of the Court, as approved by the Privy Council and the Court of Appeal, respectively, highlight the inevitable paramountcy of the test of reasonableness. In both cases, the employer assigned a good reason for dismissing the employee but failed the mandatory test of reasonableness. We will adopt the same approach in the instant Reference.
13. As stated in her Memorandum and maintained by Messrs. James and Leonard in the closing submissions, the Employee's justification of her infraction was her "attempt to detect what she believed was wrong-doing on the part of the CEO". To them, "the critical issue is not the said breach itself, but rather what transpired thereafter". In their view, having decided not to dismiss her - which it could have reasonably done when it discovered the breach in January 2014 - and since no further infraction occurred after that discovery, there was nothing which could have given the Employer the right to summarily dismiss the Employee.
14. In the circumstances, as a matter of convenience, we will resolve in sequence, the five issues as formulated by Messrs. James and Leonard. Needless to say, after careful consideration of the oral and documentary evidence we are obligated to focus on the idea of reasonableness and the application of the test thereof as prescribed by section C 58 (2).

Did the Employer waive its right to summarily dismiss the Employee?

15. In our consideration of the main reasons for the Employer's delay we have concluded as follows:
 - (a) The nature and arrangement of the Employer's business required to consult with its regional headquarters in Trinidad and Tobago. In the

normal course of things, this requirement would result in some delay. In that regard, it is fair to say that consultations were still ongoing at least up to April 2014.

- (b) A part of the Employer's evidence, which we accept, is that upon discovery of the breach of its IT system it consulted with its service provider, LIME/Flow, in an attempt to ascertain the process and circumstances by or in which someone was able to hack into its secure system. This consultation would also contribute to the delay.
 - (c) It is common ground that the Employee was absent from work on sick leave in the two periods between April 1 to April 22 and April 25 to May 19, 2014. In the circumstances, although the breach was discussed with the Employee at a meeting on March 24, 2014, it is obvious that she was not available for any follow up during the two periods of her sick leave.
 - (d) As stated in the dismissal letter, the Employer took time to consider and review the Employee's written responses in addition to her oral explanations, which were rejected as irrelevant because they provided no justification for her "unauthorized and unlawful access to the private, confidential and secured email account". Moreover, it is evident that the Employer took into consideration the Employee's subsequent unapologetic attitude which it continued to monitor.
16. In the final analysis and resolution of this issue, although it would be reasonable to criticize the Employer for the inordinate delay - subject to the discharge of its obligation to administer procedural fairness and otherwise conform to good industrial relations practices - it did not wholly waive its right to dismiss the Employee. However, as a result of the inordinate delay, the Employer did significantly weaken its position vis-à-vis that of the Employee. Accordingly, subject to our analysis below, we would be inclined to conclude that it was unreasonable to dismiss the Employee summarily, immediately upon her return from sick leave, five months after it became aware of the breach of its IT system.

Did the Employer fail to observe due process?

17. It cannot be over emphasized that each case turns on its own particular facts. It will suffice to say that, although it does in some cases, a defective procedure or the absence of a fair procedure does not always render a dismissal unfair. In considering this issue, we note the following:

- (a) Albeit that the matter was raised among other concerns which the Employer had, it is clear that the matter of the breach was first raised at the meeting on March 24, 2014. Being dissatisfied with the oral explanation given on March 21, 2014, the Employer finally requested a written explanation which the Employee provided on the same day.
- (b) In the circumstances, it appears that the Employer wrote to the Employee expressing its concerns over at least 6 matters, one of which was the unauthorized "email access". In passing, we mention that it was perhaps not the best approach for the Employer to intermingle that issue with the other five, all of which were addressed by memos on the same date.
- (c) Moreover, we find it unreasonable to raise all 6 issues on the same date namely April 1, 2014. In terms of the relative seriousness of the issues raised, it is clear that the Employer appeared to have placed the email breach on the same footing as the other matters. In other words, the Employer appeared to have assigned equal gravity to each of the six concerns addressed in the memos.
- (d) As it turned out by coincidence, the Employee proceeded on certified sick leave on April 1, 2014, the same day those memos were issued. When she returned to work on April 23, 2014, it appears that the issue of the placement of her desk became an additional and more urgent issue.
- (e) In those circumstances, having regard to the Board's earlier expressed preference for an amicable resolution of all issues, the Employee's Union Representative sought to convene a meeting which did not materialize. In any event, following the Employer's letter dated April 24, 2014 the Employee commenced her second period of sick leave the following day.
- (f) Having regard to the Employer's response to the nature and timing of the breach, the Employee's oral and written explanation, the Employee's subsequent unapologetic attitude and the effect on the fiduciary relationship of trust and confidence, we find that it was unreasonable for the Employer to omit to convene disciplinary proceedings, giving particulars of its investigations, specific allegations against the Employee and the likelihood of her dismissal. In our opinion, a fairer or better procedure could have made a difference to the outcome of summary dismissal.

(g) To highlight the latter point, we paid careful attention to Mr. Bynoe's memo to the Board dated April 15, 2014 and that to the Employee dated April 24, 2014. Most strikingly, in the memo dated April 28, 2014, issued by Dr. Richardson-Lake, the Employer's Vice President, to the Employee under the heading "Matters for the Board", the Employer:

- i. noted the Employee's unauthorized access to the email account, noted her inability to provide any satisfactory explanation; and
- ii. commented on her work performance and directed that the Employee engage in "a plan for (her) performance development with a view to upgrade her skills and performance particularly as it relates to (her) new responsibilities -" The Employer directed that the plan "be communicated to (the Employee) by the CEO."

(h) Moreover, the last paragraph of this memo reads:

*"It is the Board's view that many of the recent conflicts seem to stem from challenges in communication. In an effort to assist in your further development and to improve communications between yourself and the CEO, the Board has directed that you work from the office adjacent to the CEO's office. Finally, the Board trusts that we can look forward to your full cooperation in fulfilling the CFPA's mandate. We will continue to closely monitor the situation.
..."*

18. In the final analysis of these memos, we conclude that, having initiated an equivocal approach towards the Employee and issuing the latter memo while she was still on sick leave, the Employer evinced no intention to dismiss her. Instead, it took a conciliatory approach towards an improvement in the communications and the general relationship between the Employee and the CEO. There was absolutely no hint of disciplinary action against her on account of the breach of its IT system or any of the other five matters raised in the memos.
19. In those circumstances, if the Employer subsequently became desirous of dismissing the Employee, it should have adopted a fair procedure whereby the IT breach, together with all the other accusations, should have been formally put to the Employee. In addition, she should have been provided with particulars of the Employer's investigations, and be given a fair opportunity to respond and be represented by an attorney or another person of her choice. Moreover, it should have been brought home to the Employee that she was facing serious disciplinary action which placed her continued employment in serious jeopardy.

20. In the final resolution of this issue, we are constrained to conclude that the Employer failed to adopt a fair procedure or otherwise observe due process. Under the circumstances, those failures were critical aspects of unreasonableness.

Did the Employer breach its internal mechanism for resolution of grievances?

21. Section 10 of the Employer's Policy and Guidelines set out its "Discipline and Disciplinary Procedures". Sub section 10.5 provides that offences such as "gross misconduct" and "willful neglect of duty" warrant summary dismissal without the need for implementation of the Employer's disciplinary procedures.
22. Our consideration of this issue may be largely subsumed under the previous question as to whether it waived its right to dismiss exclusively for the email breach and / or whether the Employer failed to observe due process. We have already concluded that the observance of the Employer's internal mechanisms and its failures to otherwise execute a fair procedure could have made a difference to the outcome. In light of all the surrounding circumstances, the employer's delayed reliance on section 10.5 of its Policies and Procedures in the dismissal letter was unreasonable.

Did the Employer fail to protect the Employee and exposed her to victimization

23. This question arises only tangentially in relation to matters arising after the Employer's reaction to the breach of its email account and the consequential breach of the implied term for mutual trust and confidence. In the circumstances, since any exposure to real or perceived victimization was incidental, we do not find it necessary to consider this as a main issue in these proceedings.

Was the Employee unfairly dismissed?

24. Whether or not the Employee was unfairly dismissed requires the careful application of sections C 58 and C 59 of the Labour Code. We have determined earlier that misconduct is a good reason assigned by the Employer for the dismissal. The factual basis as required under Section C 58 (1), as admitted by the Employee, is well established. It appears that there are two primary matters for further consideration:
- (a) Whether the gravity of the misconduct was such as to entitle the Employer to summarily dismiss the Employee under section C 59 (1).
 - (b) Whether the Employer acted reasonably or unreasonably under circumstances when it dismissed the Employee. Inevitably, the resolution of this issue requires the application of the test of reasonableness under section C 58 (2) of Labour Code.

25. In terms of the statutory provisions, the question is whether the misconduct was so serious as to lead a reasonable employer to conclude that the employment relationship could not continue. It is well settled that in every employment contract there is an implied term for mutual trust and confidence. A breach of that fundamental term has the effect of seriously undermining or wholly destroying the employment relationship. As stated in the dismissal letter, the Employer formed the view that the breach "shattered the fiduciary relationship of trust and confidence required for ..." the continuation of the employment, such that it was left with no other option than to terminate the employment relationship under section C 59(1).
26. We have noted above the negative impact of the Employer's delay; its equivocal approach; and apparent equation of the gravity of the Employee's acknowledged misconduct with the other 5 issues in respect of which memos were issued on the same date.
27. Taking all the surrounding circumstances into consideration, we find that the Employer failed the statutory test of reasonableness. It was not reasonable for it to dismiss the Employee summarily, on the very day she returned from her second successive period of sick leave, on the basis of her acknowledged misconduct which occurred approximately five months earlier.
28. It is not open to us to consider what we would have done if we were in the position of the Employer. Instead, what we have to determine is whether or not the Employer's reaction to the misconduct fell within a band of reasonable responses which a reasonable employer would adopt in the circumstances. In our opinion, the action of dismissal taken by the Employer did not fall within that band. Accordingly, we conclude and declare that the dismissal was unfair.
29. For the reasons stated above, we also conclude that the Employer failed the test of reasonableness as a result of which the Employee was unfairly dismissed and is entitled to compensation. However, we also find that, as in the **Blackburn case**, the Employee contributed significantly to her dismissal. We apportion her contribution to her dismissal at 70% and will reduce her compensation, as assessed below, by that percentage.

Compensation

30. Subject to the reduction which we will make below on account of her contribution, we award compensation under the following heads:
- (a) Payment in Lieu of Pension

By virtue of the Employer's Resolution 1/4/97, the Employee is entitled to a payment in lieu of pension at the rate of 11% of her annual gross salary. Since the Employee worked for 17.42 years, **we award the sum of \$80,480.40** $\{[17.42 \times (3,500 \times 12)] \times 0.11\}$

(b) Gratuity

Under Section 1.5 of the Employer's Conditions of Employment Handbook, the Employee is entitled to the equivalent of the amount usually awarded as Loss of Protection from unfair dismissal or severance pay at the rate of \$3,500.00 per year of employment. Accordingly, **we award the sum of \$60,970.00** $(\$3,500 \times 17.42)$ under this heading.

(c) Payment in Lieu of Notice

Section 11.1 (b) of the Conditions of Employment Handbook provides that the Employee is entitled to 3 months' notice of termination of her employment. Accordingly, **we award the sum of \$10,500.00**, the equivalent of the amount she would have earned as 3 months' salary had she not been unfairly dismissed.

(d) Immediate Loss of Earnings

Having regard to her evidence of mitigation of her loss, **we award the sum of \$21,000.00**, the equivalent of 6 months' salary

Order

31. In the premises, it is hereby ordered that the Employer shall pay the net sum of \$51,885.12 - being 30% of the total amount of \$172,950.40 assessed above - to the Employee as compensation for her unfair dismissal, no later than August 31, 2023.

Dated this ^{24th} day of July 2023



Samuel Aymer
Chairman



Dr. Sir Hayden Thomas
Member

.....
St. Lawrence DeFreitas
Member

