

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD 34 of 2018



BETWEEN:

DENESIA KING

Employee

And

CLIENT COMMUNICATIONS SERVICES INC.
(formerly Call Centre Services Inc.)

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Dalmer A. McCoy

Member

Appearances:

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

Dr. L. Errol Cort and Ms. Claneisha Gomes of Cort & Cort, Attorneys-at-Law for the Employer

2023: May 16, September 8

Summary Dismissal – Employment Agreement requiring Employee to receive inbound phone calls and provide prompt online services to gaming customers – Employee dismissed on ground of serious misconduct going to the heart of the Employer’s core business – Whether procedural defects rendered the dismissal unfair.

JUDGMENT

Introduction

1. Immediately after the trial - upon careful consideration of the evidence and the oral closing submissions of the parties - we were inclined to find that the dismissal was not unfair. Notwithstanding that inclination, which was significantly influenced by the case authorities cited by Dr. Cort, Learned Counsel for the Employer, we invited the parties to file supplemental or amplifying submissions. Notably, while Dr. Cort declined our invitation, the Employee’s Learned Representatives, Messes James and Leonard, embraced the

opportunity and subsequently advanced comprehensive arguments as to why the Employee's claim should succeed.

2. In the circumstances, our initial inclination remains suspended pending our final analysis which follows. Naturally, at the end of the day, that inclination will either crystallize in the dismissal of the Employee's claim or be wholly reversed to result in a finding of unfair dismissal.

Selected Facts

3. As an international business corporation, the Employer's core business includes the processing of online transactions on behalf of customers from around the world. For that purpose, commencing on June 30, 2014, the Employee was employed as one of several Customer Service Representatives to administer telephone and email enquiries from and provide remote services to gaming customers in respect of their accounts and related matters.
4. The Employer prides itself in providing prompt and excellent services to its customers. To the desired end, it employs a Service Excellence Team whose duties and responsibilities include monitoring and reviewing the conduct and performance of the Customer Service Representatives. Being concerned with the maintenance of high levels of excellence in courtesy, efficiency and responsiveness, the Employer facilitated the discharge of the duties and responsibilities of the Service Excellence Team by recording all telephone conversations between its employees and its customers.
5. The team of Customer Service Representatives were "responsible for all inbound phone calls, chat, and email enquiries" which they were required to handle in "a mature and professional manner". More specifically, the Employee was required to "handle incoming calls in a friendly and professional manner" which would "involve answering and identifying customer needs, resolving customer concerns and processing customer transactions, including deposits and payout requests".
6. The Employee's duties and responsibilities were brought home to her during the orientation phase of her employment at which time she received her Job Description and Employment Contract as well as a copy of the Employee Handbook and the Employer's Code of Conduct. Moreover, the Employee had access to the Employer's Knowledge Base tool which she was required to have opened and refer to, when necessary, from time to time while on duty.

7. The Service Excellence Team conducted a review of the recorded call data in the period August 23 to September 12, 2015, which revealed the following:
- (a) the Employee's average call handle time was considerably lower than the normal average and she had engaged in "Queue Jumping" by manipulating the Employer's phone system so as to divert calls away from her extension by indicating that she was unavailable.
 - (b) The Employee queue-jumped 796 times during the three-week review period; 217 times during the preceding 12-day period in August 2015; and an alarming 147 times on September 8, 2015.
 - (c) Over the period August 11 to 20, 2015, the Employee had intentionally disconnected 9 of the 11 calls routed to her. And she made no report of the same to inform her supervisor that the calls had been unintentionally disconnected, if that were the case.
 - (d) On August 11, 2015, in response to a customer's request for assistance about an account, the Employee placed the call on hold for approximately 10 minutes. During that holding period, before abruptly disconnecting the call, the Employee gave the customer the impression that she was attempting to connect with the Accounts Department, but in fact she was dialing a series of fictitious numbers.
8. On September 19, 2015, the Employer convened a meeting with the Employee thereby giving her an opportunity to respond to the allegations against her. The Employer's Human Resources Manager Claudine Landfield chaired the meeting at which the Customer Service Manager, Mrs. Elvira Warren Zachariah, was also present.
9. Having heard the Employee's responses to the allegations, the Employer concluded that she was guilty of gross misconduct. Accordingly, by letter dated September 21, 2015, the Employee was dismissed on that ground. In the letter the Employer stated its findings as summarized above. In particular, the letter detailed the Employee's interaction with the particular customer who she kept on hold for 10 minutes. The letter also itemized the 24 "Ghost Extensions" which the Employee dialed, while repeatedly making false excuses to the customer. In that regard the Employer stated:

"To have you put a client on hold for almost ten minutes while you dialed "ghost" extensions is dishonest, unproductive, very poor customer service and a grave breach of your duties as a CSR which, in our view, is tantamount to gross misconduct on

your part. This investigation also showed that the disconnected call was ended by yourself and was not due to technical issues."

10. As to "One Jumping", the Employer stated:

"To have you queue jump this amount of times is dishonest, unproductive, very poor customer service and a grave breach of your duties as a CSR which, in our view, tantamount to gross misconduct on your part."

11. And in relation to "Disconnected Calls" the Employer stated:

"Again, your behaviour in this regard amounts to gross misconduct, evidencing extremely poor customer service on your part, and a serious breach of your terms of employment with Call Centre Services as a Customer Service Representative."

12. As to the Employee's responses to the allegations put to her at the meeting on September 19, 2015, the Employer stated:

"In summary, your responses to the findings of our investigation were wholly unsatisfactory and our findings remain uncontroverted."

Denesia, you hold the position of Customer Service Representative, your main job responsibility is to assist clients via phone and email, based on the information above, and the evidence provided to support our findings, we have no choice but to terminate your employment with Call Center Services with immediate effect, for gross misconduct."

The Reason for the Dismissal

13. Needless to say, our approach to the resolution of the main issue of whether or not the Employee was unfairly dismissed starts with the statutory requirements of Sections C58 of the Antigua and Barbuda Labour Code. In simple terms, the Employer is required to prove that (a) it had a good reason for the dismissal, and (b) that it acted reasonably in dismissing the Employee.

14. The nature and scope of the Employer's business and the Employee's duties and responsibilities are not in dispute. Moreover, it is not in dispute that the Employer meticulously set out the Employee's terms and conditions of employment as well as in its policies and requirements in the Employment Agreement, the Job Description, its Call Centre Service Handbook and Code of Conduct. Further, it is not in dispute that the Employer's business and the discharge of the Employee's duties rely heavily on information technology which allows for the contemporaneous recording and subsequent transcription of the audio interactions between the Customer Service Representatives and the customers.

15. Based on the Employer's disclosed records of the Employee's interactions with the customers, we conclude that there were sound factual bases for the Employer's conclusions that the Employee was guilty of misconduct. In our estimation, Messes James and Leonard did not mount any serious challenges to the disclosed factual bases of queue jumping, ghost calling and disconnected calls.
16. Indeed, under cross examination the Employee acknowledged the crucial role she and the other Customer Service Representatives played in the Employer's business and the negative impact it would have if she did not perform well. Further, the Employee admitted that she had engaged in queue jumping but did not agree that she had done so 796 times. Similarly, she acknowledged that she did queue jump but denied that it was as many as 147 times. As to the fake calls to ghost extensions, the Employee denied making them saying that "this does not make sense ... I don't recall making them." In addition, she specifically denied dialing 13 fake extensions and asserted that she "would not have held the call that long ... I do not recall the exact specifics of the call" ... If that happened, I would agree that that behaviour was unacceptable".
17. As to the integrity of the Employer's IT System, we accept Ms. Landfield's evidence that the Employer experienced no data breach at the material time. No hackers had breached the Employer's firewall which she asserted was one of the best available on the market. Thus, in the absence of any technical defect caused by hacking, or malfunctioning of the Employer's electronic equipment, we further conclude that its recordings and transcripts thereof are accurate, reliable and conclusive.
18. In the premises, we find that the Employer established that it had good reasons with sound factual bases as required under Section C 58(1) of the Labour Code. Therefore, it met the statutory threshold for the dismissal of the Employee.

The Test of Reasonableness

19. That conclusion leaves us to apply the statutory test of reasonableness as is required under Section C 58(2) of the Labour Code. That ubiquitous test "is whether or not under the circumstances, the Employer acted unreasonably or reasonably ..." when it summarily dismissed the Employee.
20. As we understand it, the nub of the Employee's submissions as advanced by her Learned Representatives, is that there was a lack of procedural fairness which rendered the dismissal unfair.

21. In their assertion of the Employee's case, her Representatives highlighted the following main categories of procedural defects which should render the dismissal unfair:

- (a) It was not open to the Employer to administer further disciplinary action after September 19, 2015 because on that date the only accusation put to the Employee was that she was guilty of "queue jumping". After admitting to that offence – to a lesser extent than what the Employer eventually accused her of – she was merely warned to desist from that practice. That warning constituted the full extent of the disciplinary action against the Employee in respect of what she was accused of.
- (b) And since no other issues were raised with her and she was not subsequently warned that her employment was in jeopardy, it was unreasonable for the Employer to make further allegations and then dismiss the Employee as it did on September 21, 2015.
- (c) It was not until she reported for duty on September 21, 2015, that allegations were put to her about a significant number of queue-jumping, dialing of ghost extensions, disconnecting calls and deliberately placing a customer on hold for a long period. After the allegations were put to her, the dismissal letter which had already been prepared was delivered to her.
- (d) In acting as it did on September 21, 2015, the Employer committed several breaches of the well-known principles and practices of natural justice and good industrial relations, as well as its own Code of Conduct, all of which constitute elements of unreasonableness. In particular, Messrs. James and Leonard highlighted that the Employee was not fully informed in advance of all the allegations against her so that she had no opportunity to confront her accusers, properly prepare her defence or seek representation.
- (e) In terms of the provisions of the Code of Conduct, her Representatives assert that as a result of the Employer's several breaches thereof, the Employee was deprived of "objective, consistent and fair treatment", to which she was entitled, and as a result the Employer had no proper basis for dismissing her.

22. We are convinced that the full extent of the accusations against the Employee, as reflected in the dismissal letter were not put to her during the meeting on September 19, 2015. By extension we accept that she was not involved in the Employer's investigation and was not told the full extent of the findings. Moreover, it is clear that the Employer did not convene a disciplinary hearing and ultimately failed to abide by the requirements for procedural fairness.
23. Notwithstanding the absolute need for the application of the test of reasonableness in unfair dismissal claims such as in this case, there is no doubt that it is difficult to define "reasonableness". However, the test must be applied with due regard for the provisions of Division C of the Labour Code, with particular reference to Part 5 thereof.
24. There is no prohibition against summary dismissal of an employee as occurred in this case. In fact, Section C 9 empowers an employer to dismiss an employee without advance notice, subject to the limitation proscribed in section C 59 (1). Thus, summary dismissal may be justified if circumstances arise under which "the employer cannot reasonably be expected to take any course other than termination". One such situation would arise where the employer has "conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue"
25. In our view, those provisions significantly reduce the gravity of any failure on the part of an employer to abide by the strict requirements for procedural fairness as embodied in the adherence to the principles and practices of natural justice and good industrial relations. Accordingly, the essential issue to be resolved on this point is: Whether a fairer procedure or stricter adherence to the principles and practices of natural justice and good industrial relations would have made a difference in the outcome. The resolution of that issue turns on two aspects.
26. Firstly, the nature of the employment, the alleged misconduct and the surrounding circumstances are all pivotal. In **Wilson v Racher [1974] IRLR 114**, Edmund Davies LJ referring to the earlier statement of Hill J. in the 1860 case of *Edwards v. Levy* asserted:
- "There is no rule of thumb to determine what misconduct on the part of a servant justifies summary termination of his contract. For the purpose of the present case, the test is whether the plaintiff's conduct was ...to such a degree as to be incompatible with the continuance of the relation of master and servant... the application of such test will, of course, lead to varying**

results according to the nature of the employment and all the circumstances of the case...each case turning on its own facts"

27. There is no doubt that the statutory provisions of sections C 9 and C 59 represent a codification of the above stated and well-settled common law position. Accordingly, summary dismissal is justified if the Employee's conduct is or tends to be repudiatory of the employment agreement. In this case, we have no doubt that the nature and magnitude of the Employee's misconduct such that it is or tends to be repudiatory. She was either refusing to do what she was hired to do or willfully sabotaging or deliberately frustrating the Employer's business.
28. Secondly, the strength of the evidence of the Employee's misconduct is also pivotal. In **Refence No. 2 of 1979, Cable & Wireless (W.I.) Ltd v Hill et al**, this Court in stating the required standard of proof, stated:
- "Since summary dismissal is to be regarded as "a strong measure" ...the standard of proof will have to be strict, persuasive and convincing. As this is a civil matter, the standard of proof must be according to the balance of probabilities, but nevertheless, since the matters to be proved are grave and weighty in nature, this Court will expect the evidence adduced by the Company to be correspondingly cogent and weighty in nature and content."**
29. In our opinion, the Employer's evidence substantiating the Employee's misconduct is cogent and weighty. Being strict, persuasive and convincing, It met the required standard and points to a fundamental breach of the employment agreement.
30. Since its establishment over 40 years ago, this Court has honoured the old adage "each case turns on its own facts". Historically, cases such as **W. Devis & Sons Ltd. v Atkins [1977] IRLR 314** and **Polkey v A. E. Dayton Services Ltd [1987] IRLR 503**, the House of Lords has established that non observance of a fair procedure or the non-compliance with all the principles and practices of natural justice and good industrial relations do not necessarily render a dismissal unfair. In other words, in some cases, the absence of a fair procedure may render a dismissal unfair. In other cases, it does not because a warning of dismissal and a proper disciplinary hearing would be 'utterly useless" since they would have made no difference to the final outcome. In our opinion, the instant case falls squarely in the latter category.
31. In passing, we note the usefulness of the Employer's persuasive authorities as cited by Learned Counsel, Dr. Cort. Similarly, we acknowledge the spirited

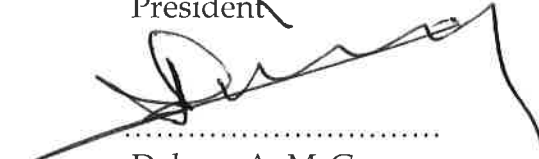
analysis of those authorities by the Employee's Learned Representatives, whereby they successfully distinguished them from the instant case.

Conclusion

32. In the premises, we are of the opinion that the Employer passed the test of reasonableness. It was reasonable for the Employer to consider the misconduct as being so serious or gross such as to constitute a repudiatory breach of the terms and conditions of the employment. In other words. The action of dismissal taken by the Employer fell within a band of reasonable responses which a reasonable employer would have adopted in the circumstances.
33. In closing the loop with our introduction above, our initial inclination has crystallized into our conclusion that the Employee was not unfairly dismissed. As a result, we are constrained to dismiss her claim.

Dated this  day of September 2023


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Charlesworth O. D Brown
President


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Dalmer A. McCoy
Member

