

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/4 of 2017

BETWEEN:

GLENROY FRANCIS

Employee

and

**MASSY TECHNOLOGIES INFOCOM
(ANTIGUA) LIMITED formerly
ILLUMINAT (ANTIGUA) LIMITED**

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samantha May-Francis

Vice President

The Hon. Hesketh A. Williams

Member

Appearances:

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

Ms. E. Ann Henry KC of Henry & Burnette, Attorneys-at-Law for the Employer

2022: November 22

2023: February 24

JUDGMENT

Brown, P:

Introduction

1. At all material times, the Employer was a member of the Neal and Massy regional group of companies. It was engaged in the business of communication and information technology including the importation, sale and servicing of electronic office equipment in Antigua and Barbuda. Subject to the policies and directives of its regional board, its Country Manager, Acres Stowe was in charge of the company's local day to day operations. The company shared a common Chairman and Chief Executive Officer, Michael Armstrong, with its sister company Massy Technologies Infocom (Barbados) Limited in Barbados. The



Head Office of both companies and others in their corporate group, was situated in Trinidad while Mr. Armstrong discharged his duties and responsibilities from his office in Barbados.

2. At all material times, Sven Harder, trading as NewspaperDirect Antigua (Newspaper Direct), a web-based business duly registered in Antigua and Barbuda, was a customer of the Employer.
3. The Employee commenced his employment with the Employer as a Sales Executive in October 1992. His last position, which he held since 2005 until his dismissal in May 2012, was that of Sales Manager. In the latter position, he reported to Mr. Stowe, who in turn reported to Mr. Armstrong.
4. During the course of his employment, the Employer provided the Employee with its "**Employee Information Guide**", Article 3.19 of which explains conflicts of interest and stipulates that a breach of that policy could result in the termination of his employment.

The Main Issue

5. By his Memorandum of Claim in this Reference, the Employee contends that he was unfairly dismissed and claims compensation therefor. His position is that his joint acquisition with Mr. Stowe of NewspaperDirect did not amount to a breach of the Employer's conflict of interest policy and /or a breach of his implied duty of good faith and fidelity, as expressed in the dismissal letter such as to justify his summary dismissal.
6. In disputing the Employee's claim, the Employer admits that it dismissed the Employee and contends that it had a good factual basis for coming to its conclusion that the Employee was engaged in a conflict-of-interest, contrary to its expressed policy. In addition, the Employer contends that the same factual basis reveals that the Employee was, in effect, in breach of his implied duty of good faith and fidelity. Further, the Employer maintains that although he was given ample opportunity for doing so, the Employee provided no acceptable explanation for his conduct and was not able to exculpate himself.
7. Given those opposing positions, the main issue in dispute between the parties is whether or not, under the circumstances, the Employee was unfairly dismissed.

Legal Framework

8. The starting point for the resolution of the main issue is the fundamental law regarding the employment relationship. In Reference No. C/24 of 2017: **Faith Piggott v. Woods Pharmacy Limited** this Court applied the pertinent legal

principles, found that the employee was in competition with her employer and dismissed her claim of unfair dismissal. Paragraphs 14 and 15 of the judgment read:

14. ... The pertinent legal principles can be traced back to the late 19th Century. In the case of **Sanders v Parry** [1967] 2 All ER 803, Havers J. referred to the previously established authority of **Wesser Diaries Limited v. Smith** [1935] All ER 78, in which the court quoted the words of Smith L. J. in **Lamb v. Evans** (1893) 1 Ch 218, as follows:

“... I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity...”
15. Later, in **Hivac Ltd v. Park Royal Scientific Instruments Ltd** [1946] 1 All ER 353, Lord Greene, M. R. said:

“... it has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable...
...During the subsistence of the contract of service and during his master’s time the servant has to look after, not his own interests, but those of his master”.
... in my view, the obligation of fidelity subsists so long as the contract of service subsists, and even in his spare time an Employee does owe that obligation of fidelity...”
9. Moreover, having regard to the dictum of Browne-Wilkinson J. in **Woods v WM Car Services (Peterborough) Ltd.** [1981] ICR 666, in respect of an employer’s obligation, it is also “indisputable” that an implied term of “mutual trust and confidence” must necessarily be read into every contract of employment to the effect that neither employer nor employee should “without reasonable and proper cause” conduct itself/himself in “a manner likely to destroy or seriously damage the relationship of trust and confidence” between them.
10. Significant parts of the **Employee Information Guide** are firmly grounded on the fundamental implied terms of the contract of employment. Thus, apart from creating specific express obligations on the Employee, the Guide specifically reinforces the implied duty of good faith and fidelity, the obligation of mutual trust and confidence and the potential consequence of their breach. In respect of conflicts of interest, Articles 3.19 reads:

“Your interests conflict with that of the Company when you profit, or place yourself in a position to profit directly or indirectly, through the use of your Company position...”

If you are in a position to make or influence a decision regarding a business transaction between the Company and a third party, you should not accept anything of value from that party...

Conflict of interest violations may result in termination of employment".

11. As to the **Antigua and Barbuda Labour Code** (the Labour Code), section C 58 provides that a dismissal shall not be unfair if (a) the reason assigned by the Employer "relates to misconduct of the employee on the job within the limitations of section C 59 (1) and (2)", **and** (b) the employer acted reasonably under the circumstances.
12. Further, subject to the provisions of section C 59 (1) of the Labour Code, section C 9 (1) empowers an employer to summarily dismiss an employee who engages in serious misconduct which "clearly demonstrates that the employment relationship cannot reasonably be expected to continue" so that "the employer cannot reasonably be expected to take any course other than termination".
13. 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 employment 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"**.
14. The overarching component of the legal framework in this case is section 10 of the **Industrial Court Act**, Cap. 27 of the Laws of Antigua and Barbuda which imposes a mandate on this Court to **"act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code."**
15. Going forward, we will carefully consider the evidence, take into account the closing submissions and resolve all pertinent issues within the foregoing legal framework.

Common Grounds

16. Having carefully considered all the evidence, our findings of fact include the following significant common grounds, which are substantially reflected in Learned Counsel's summary of "Material and undisputed facts" set out in her closing submissions.
17. In or about November 2009, unbeknownst to the Employer, the Employee and Mr. Stowe became the joint owners of the business NewspaperDirect. One month later, NewspaperDirect was transferred to S&F Holdings Limited, a company owned by the Employee and Mr. Stowe. Prior to and at the time of its acquisition, as was well known to the Employee and Mr. Stowe, the business was substantially indebted to the Employer for goods and services sold and delivered to it on account by the Employer.
18. As a part of his responsibilities, Mr. Armstrong arranged and chaired monthly meetings to review the Employer's accounts receivables. Such meetings were convened between 2009 and 2011. Apart from Mr. Armstrong, those usually present at the meetings included the Employee, Mr. Stowe, Ms. Lisa Parker (Accounts Supervisor) and Alesia Persaud, Finance Manager for operations of the Employer and its sister company in Barbados. Matters discussed at the meetings included the continuing delinquency of NewspaperDirect.
19. Notwithstanding the recurring attention given to it at the meetings, the indebtedness of NewspaperDirect to the Employer continued to accumulate over the years between 2009 and 2011. As at November 2011, after several invoices and demands for payment did not produce the desired result, the Employer gave instructions to its Attorneys-at-law for the commencement of legal action to recover over \$192,500.00, then outstanding from NewspaperDirect.
20. Based on information it received from its Attorneys in or about May, 2012, the Employer first became aware that NewspaperDirect was legally owned by S&F Holdings Limited and that the Employee and Mr. Stowe were the joint owners of that company.
21. On or about May 17, 2012, armed with the information about the ownership of S&F Holdings Limited and NewspaperDirect, the Employer confronted the Employee and Mr. Stowe on the matter via telephone and gave them an opportunity to explain their positions.
22. In the morning and afternoon of May 22, 2012 the Employer convened two face-to-face meetings with the Employee at which he was further confronted on the matter. By a first letter issued on the same date and delivered to the Employee at

the meeting in the morning, the Employer requested that the Employee offer explanations about the situation. At the meeting in the afternoon, the Employer acknowledged the explanations offered by the Employee and suspended him until May 24, 2012 pending the outcome of its further investigation and consultation among the senior executives of the group of companies.

23. On the Employee's return to work on May 24, 2012, after the one-day suspension, he was dismissed by letter bearing the same date, which includes a statement of the reasons for the dismissal. The following excerpts from that letter are most instructive:

" ...

We refer to previous communication and our meeting of May 22, 2012 to discuss our conversation of May 17, 2012 with Acres Stowe, Country Manager/Director, ILLUMINAT (Antigua) Limited, where he volunteered for the first time, that you both have an interest in NewspaperDirect Antigua, a customer of the company, in circumstances where the company had decided to pursue legal actions against NewspaperDirect Antigua.

...

You provided explanations that were considered, which assisted us in concluding our investigation. Of particular importance is that you confirmed that your company, S&F Holding Limited, owns the business NewspaperDirect Antigua, which is indebted to the company, your employer.

...

Notwithstanding your responses, we have come to the conclusion that your failure to disclose to the Company in October 2009, your interest in NewspaperDirect Antigua, is in contravention of the Company's Conflict of Interest Policy which is set out in the Employee Information Guide ("EIG") and which states:

...

Furthermore your working involvement is in contravention of the company's policy on Other Paid Employment as set out in the EIG. This policy states in part:

...

Additionally your acceptance of the directorship in S&F Holding Limited contravenes the company's policy on elective and appointive offices as set out in the EIG which states in part:

...

Further, as the senior employee of the company holding the position of Sales Manager, you have an implied duty of good faith and fidelity during the currency of your employment. Your actions placed yourself in a position in which there was a conflict of interest between you and the

Company which resulted in you looking after your own interest to the detriment of the Company's interest. Your action and interest in NewspaperDirect Antigua conflicted with your duties as a senior employee of the Company. As a senior employee of the Company, we must indicate that your gross misconduct has undermined the trust and confidence which is an essential part of the contract of employment. As a result therefore, the employment relationship cannot reasonably be expected to continue.

The abovementioned breaches of the Company's Policy and implied duty of good faith and fidelity amount to a repudiation of the contract of employment. We hereby advise that we accept your repudiation of the contract of employment. We therefore wish to advise that your services are being terminated with immediate effect. "

Discussion

24. **Black's Law Dictionary, 10th Edition**, defines a "fiduciary" as "someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes another the duties of good faith, loyalty, due care, and disclosure:- the corporate officer is the fiduciary to the corporation". In addition, "fiduciary duty" is defined as "a duty of utmost good faith, trust, confidence and candor owed by a fiduciary to the beneficiary...". Further, a "conflict of interest" is defined as "a real or seeming incompatibility between one's private interests and one's ... fiduciary duties".
25. The dismissal letter clearly establishes the Employer's reasons for the dismissal, including the following:
 - a) Breach of the express conflict of interest policy
 - b) Breach of the implied duty of fidelity and good faith
 - c) Breach of the implied term of mutual trust and confidence.
26. As a *coup de grace*, perhaps considering the matter from a different perspective, the Employer sought to put the proverbial final nail in the Employee's coffin by concluding that his several breaches amounted to a repudiation of the contract of employment, which repudiation it accepted. And the acceptance resulted in the termination of the employment relationship.
27. We are satisfied that the Employee well knew of the structure of the Employer's operations in the context of its membership in the regional group of companies. In particular, the Employee was fully aware of the hierarchical role, responsibilities and duties of Mr. Armstrong, as the Employer's highest-ranking

administrator, vis-à-vis Mr. Stowe. Further, we are satisfied that the Employee was fully aware of the Employer's policies in relation to conflicts of interest and other relevant matters as stated in its Employee Information Guide.

28. In the context of the Employer's operations and the oversight exercised by Mr. Armstrong, the Employee had a clear obligation to disclose his interest in NewspaperDirect to the Employer. Neither the knowledge nor involvement of Mr. Stowe in the acquisition of the business nor Mr. Harder's continuing involvement in relation to the delinquent account provided any excuse or justification for the Employee's breach of the policy.
29. In his senior position as Sales Manager, there is no doubt that the Employee was aware that NewspaperDirect was one of the Employer's customers and had become seriously delinquent. From time to time, both the Employee and Mr. Stowe requested the Employer's leniency towards NewspaperDirect in respect of its increasing indebtedness. In particular, the Employee was aware of the Employer's several invoices and demands for payment, 27 of which were issued between 2010 and 2011. Moreover, the Employee participated in several monthly meetings, organized and chaired by Mr. Armstrong and also attended by Mr. Stowe, during which the indebtedness of NewspaperDirect was repeatedly discussed as a matter of grave concern.
30. The facts disclose that the Employee was actively engaged in a clear conflict of interest for a prolonged period between November 2009 and May 2012. His breach of the policy was neither a chance occurrence nor an innocent mistake. It was a result of his own deliberate actions, firstly, by entering into agreements with Mr. Harder as a joint purchaser of NewspaperDirect. Secondly, in concert with Mr. Stowe, he deliberately doubled down on his initial action by becoming the joint incorporator, shareholder and director of S&F Holdings Limited and transferring the business to it.
31. Moreover, having willfully committed the breach, the Employee concealed his transgression and failed to disclose it for the protracted period, although he had ample opportunities to do so, including his participation in the monthly meetings. It was not until May 2012, upon being confronted, that the Employee reluctantly admitted his interest in NewspaperDirect. Nevertheless, he maintained his position that since it was Mr. Stowe who initiated the acquisition, he had no duty to otherwise disclose the conflict and was therefore not in violation of the policy.
32. Naturally, based on our conclusion that he was engaged in a clear conflict of interest, it follows that the Employee was in breach of his duty of fidelity and

good faith. That breach is tantamount to a breach of the implied term for mutual trust and confidence.

33. In considering whether the dismissal was unfair, we are constrained by the provisions of Section C 58 of the Antigua and Barbuda Labour Code (the Labour Code). Firstly, under section C 58(1), the Employer must establish the factual basis of the conflict situation. In terms of the statutory provisions, learned Counsel submitted both sections C 58 (1) (a) and C58 (1) (e) as well as C 59 (1) (a) are applicable. We agree. In any event, in terms of the cumulative effect of the actions and omissions of the Employee, the substantial part of the provision under subsection C 58 (1) (e) is applicable: the dismissal was well grounded on “a substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held.” Thus, in addition to subsections C 58 (1) (a) and C 58 (1) (e), the Employer properly relied on subsection C 59 (1) (a).
34. In determining the main issue as to whether or not the dismissal was unfair, notwithstanding our finding that the Employee engaged in a clear conflict of interest, we are obligated to additionally apply the test of reasonableness as established by section C 58 (2) of the Labour Code. The test is “whether or not under the circumstances, the employer acted unreasonably or reasonably” in dismissing the Employee.
35. The application of the test calls for consideration of the surrounding circumstances over and above the factual bases of the reason for the dismissal. The surrounding circumstances include the manner in which the breach was committed and the subsequent actions taken by the parties. For present purposes, we will focus on the fairness of the procedure adopted by the Employer before the dismissal.
36. Like reasonableness, fairness is synonymous with the principles and practices of good industrial relations. We have carefully considered the actions of the Employer in handling the situation, including the following steps:
 - a) Upon receiving confirmation of the Employee’s conflict of interest, the Employer promptly confronted the Employee via telephone on May 17, 2012 and gave him an opportunity to explain his position.
 - b) Following the telephone confrontation, the Employer carried out further investigations of the matter to further ascertain the culpability of the Employee.
 - c) Having heard his oral explanation, the Employer convened two face-to-face meetings with the Employee on May 22, 2012. By letter of the same date, delivered at the first meeting, the Employer further underscored its

concerns to the Employee and requested that he offer explanations for his "contravention" of the conflict of interest policy and his "deliberate and misleading actions" over the preceding several months.

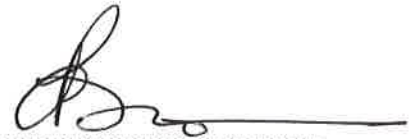
- c) By a separate letter, also dated May 22, 2012, delivered at the second meeting, the Employee was suspended with pay until May 24, 2012 pending further investigations and consultations with senior executives of its group of companies.
- e) On May 24, 2012 the Employer, having completed its further investigation and consultations, delivered the dismissal letter to the Employee dismissing him for the reasons stated therein.

37. In the final analysis, we are of the view that the Employer met the requirements of procedural fairness. The Employee's actions and reactions clearly demonstrated that the employment relationship could not reasonably be expected to continue. The certain result was that, the Employer could not have been reasonably expected to take any course other than termination.

Conclusion

38. For the reasons stated above, in discharging our statutory mandate, we conclude that the Employer (a) had good reasons for dismissing the Employee; and (b) acted reasonably, under the circumstances, in dismissing him. For the avoidance of doubt, it is our opinion that the Employer's action in dismissing the Employee falls squarely within the band of reasonable responses which a reasonable employer would make in the circumstances. It follows that, as convincingly submitted by Learned Counsel, the Employee was not unfairly dismissed. Accordingly, we grant the Employer's prayer that the Employee's claim herein be dismissed.

Dated this 24th day of February 2023



Charlesworth O.D. Brown
President



Samantha May-Francis
Vice President



Hesketh A. Williams
Member

