

**ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMEBER**

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO C/41 of 2020

BETWEEN:

ASARNI THOMAS

Employee

and

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

Employer

Before:

The Hon. Charlesworth O.D. Brown

The Hon. Judith Dublin

The Hon. Dalmer A. McCoy

President

Member

Member

Appearances:

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

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

2023: May 22 / June 16

Breach of implied term for mutual trust and confidence - Breach of Employer's policies and rules - Employer operating call centre - Staff complement of approximately 120 predominantly female - Male Customer Service Supervisor with express duties and responsibilities - Infraction of rule requiring Supervisor to report intimate relationships with subordinates - Employee holding fundamental views contrary to policy and rule - Whether Employer acted reasonably - Whether procedural defects rendered dismissal unfair

JUDGMENT

Brown, P;



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Background

1. The Employer is an international business corporation carrying on the business of a call centre from its premises at Canada Place, Lauchland Benjamin Drive, St. John's, Antigua. Its core business includes the processing of online transactions on behalf of



customers from around the world. For that purpose, it employs several Customer Service Representatives, selected ones of which are promoted from time to time to the positions of Customer Service Supervisor and Multi-Skilled Customer Service Supervisor.

2. The Employee commenced his employment as a Customer Service Representative on March 17, 2014. He held that position until he was promoted to the position of Customer Service Supervisor on June 1, 2017. In November of that year, he was further promoted to the position of Multi-Skilled Customer Service Supervisor. Up to December 2018, he was receiving a salary of \$5,385.80 plus allowances of performance pay and overtime pay.
3. Apart from the Antigua and Barbuda Labour Code (the Labour Code), the Employee's employment was largely governed by the Call Centre Services Employee Handbook (the Employee Handbook), as extended by the Employee's Code of Conduct (the Code of Conduct), which was issued to him at the commencement of his employment. The offences and related sanctions listed in that Code include "professional misconduct," certain types of which employees are required to report. In particular, Rule 4.11 provides: *"Failure to report an intimate relationship between a superior and subordinate which may result to compromises in Job Performance and may affect the interest of the company,"* will result in progressive disciplinary actions potentially leading up to dismissal.
4. By way of introduction, the Code of Conduct lists a statement of its aims to include the establishment of *"guidelines, systems and procedures for creating and reinforcing personal and professional standards of behavior and performance for individuals, groups and the organization as a whole"*.
5. The Employee was dismissed by letter dated December 24, 2018 which stated:
" ...
Asarni, the organization hired and entrusted you with specific responsibilities. As a leader, you are empowered to lead by example and carry through these values to your staff. Based on the information brought to light and your history of similar unprofessional conduct we lack the confidence in your ability to carry out your core duties in a professional manner while upholding our company values and maintaining a safe working environment for our staff. Asarni, based on the information above and the evidence provided to support our findings, your employment with Call Center Services will be terminated with immediate effect."
6. In his Memorandum of Claim, the Employee admitted that he had contravened Rule 4:11. Further, he averred that, in dismissing him as it did, the Employer failed to afford him due process and natural justice; that before his dismissal, he was not

aware that his employment was in jeopardy; he was not informed of the outcome of the Employer's investigation; and that he was given no opportunity to defend himself. Moreover, the Employee contended that, in any event, his summary dismissal was too harsh a penalty given the Employer's own infraction of the policies and procedures contained in its Code of Conduct.

7. In disputing the Employee's claim, the Employer relied on several grounds, including the following:
 - (a) As early as November 27, 2017, the Employee had received a final written warning in respect of his admitted misconduct of the "*inappropriate touching*" of one of his subordinates.
 - (b) In January 2018, the Employee was given a further written warning for sending a "*kiss face emoji*;" to one of his subordinates, which was visible to all the other subordinate customer service employees participating in the online conference.
 - (c) Between January 2018 and December 2018, the Employer received several reports of the Employee engaging in "*inappropriate sexual relationships with multiple employees*" at the workplace.
 - (d) In December 2018, the Employee admitted his involvement in another intimate relationship with another one of his subordinates who reported the matter to the Employer. That relationship resulted in a strained work relationship between the Employee and his subordinates.
 - (e) At a meeting convened on December 20, 2018, to provide the Employee with an opportunity to respond to the latter allegations. The Employee denied that he had an obligation to report the relationship in accordance with Rule 4:11 because that information was private and could not be disclosed by him without the consent of the other employee with whom he had the relationship.
 - (f) By his responses aforesaid, the Employee evinced a clear and continuing intention not to comply with required process of disclosure in accordance with the Code of Conduct.
 - (g) In light of his history of past infractions and his expressed disregard for Rule 4:11, the Employer concluded that the Employee's position would have a negative impact on the Employer's business and compromise the job performance of his subordinates. On those bases, the Employer lost confidence in the Employee's ability to carry out his core functions in a

professional manner and concluded that his behaviour was tantamount to gross misconduct such as to justify his dismissal

- (h) At the said meeting, the Employee had expressly admitted to the sexual harassment of some of his subordinates
- (i) Further, or in the alternative, the Employer maintained that given the Employee's supervisory role, he had breached his implied obligation in his contract of employment to avert incidents of sexual harassment and to protect the Employer from potential legal liability
- (j) The dismissal was effected within the ambit of sections C 56, 58 and 59 of the Labour Code and that it acted reasonably in the circumstances.

Discussion

8. Based on the oral and documentary evidence, it appears that the Employer placed much emphasis on informing its staff of:
- a) its objectives, policies and rules;
 - b) their specific duties and responsibilities.

This is evident from the apparent meticulous preparation of the terms and conditions of the Employee's employment; his initial job description; and the amended versions of the same upon his two promotions.

9. It is noteworthy that, at onset of the employment relationship, the Employer was careful to highlight the significance of the Employee Handbook as extended by the Code of Conduct, which set out the Employer's guiding policies and rules. As noted in its introductory paragraph, the Code of Conduct was issued to:
- "ensure that appropriate behaviors and the right values are exhibited and reinforced in the workplace and a healthy work climate is created. This Code of Conduct (CODE) is being issued to further define the ideal and acceptable standards of behaviour as well as deviations from these."*

10. As it is with the categories or types of misconduct generally, the offences listed in the Code of Conduct are not exhaustive. The introductory section also repeatedly emphasizes that fact. In particular, under the heading Policy Guidelines, Clause 3 provides:

"This Code does not cover all possible offenses that may be committed in the organization. Thus, the immediate superior of the employee must not limit disciplinary action only to those acts that constitute a clear violation of the written rules. A reasonable sense of justice and common sense would recognize those acts which, although not specified in the Code, are clearly harmful to the employees and/or the Company. Such acts must be corrected and, therefore, be subject to the guidelines provided."

11. The Code of Conduct categorizes offences to include *“Serious Misconduct”* which is defined as:

“an improper conduct willful in character and of such grave nature that transgressed some established and definite rule of action in relation to the employee’s work.”

Rule 4:11 falls under the sub-category of *“Acts Against Professional Conduct.”*

12. The fountainhead of the Employer’s decision to dismiss the Employee is the lengthy meeting between himself; Nicole Naddour, Head of Human Resources; Olive Richardson, Head of Operations; and Tim Hardin on December 20, 2018 . As matters of fact, determined from the Employer’s evidence as given by Mrs. Naddour, and from the Employee himself during his cross examination as clinically executed by Learned Counsel, we find that the Employee:

- a. Acknowledged his leadership role and the requirement for him to lead by example and be beyond reproach in the discharge of his duties and responsibilities.
- b. Acknowledged that he had been involved in intimate relationships with members of staff including one which had been over the preceding 6-month period;
- c. Acknowledged that he had heard stories of intimate relationships between himself and other employees on multiple occasions;
- d. Asserted that he did not think it was necessary to bring the allegations to the Head of Operations because it was just talk and he did not feel it was a problem;
- e. Asserted that it was not a problem because none of the subject employees with whom he was rumored to have had intimate relationships were directly or indirectly under his supervision;
- f. Admitted that under the Employer’s “Umbrella Supervisory Method” he could be responsible for another supervisor’s team member regardless of the department in which they worked;
- g. Asserted that, although he was aware of his responsibility to report an intimate relationship, the relevant infraction was private information which could not be disclosed without the approval of the other person in the relationship with him. Further, he asserted that the responsibility did not arise because the relationship was not serious and was in fact “on again and off again”.

- h. Admitted to repeated infractions of the Employers policies generally and Rule 4:11 in particular.
 - i. Admitted that he was engaged in an intimate relationship with a particular person and that it had been on again and off again for the better part of the previous 6 months.
 - j. Stated that he personally saw nothing wrong with a member of staff engaging in a personal relationship with another employee.
 - k. Asserted that, in this modern-day age, there is nothing wrong with having an intimate relationship with a subordinate and there would be no reason to question favoritism or biased judgments in such instances.
 - l. Acknowledged that his opinion on personal relationships at the workplace was out of line in light of his position, his duties and responsibilities and the Employer's contrasting stance on the issue.
13. As we understand it, the nub of the Employee's case is the denial of procedural fairness - a breach of the principles of natural justice and good industrial relations practices - which in his view, should lead to the Employer's failure of the statutory test of reasonableness under Section C 58(2) of the Labour Code and the conclusion that the dismissal was unfair.
14. Although they often do, procedural defects do not always render a dismissal unfair. Needless to say, each case turns on its own facts. In our careful consideration of the evidence, as far as we can discern them we are obligated to have regard to the nature of the Employer's business; the scope of its undertaking, the size and gender bias of its staff complement; and the organization of its business and the environment in which it operates.
15. In our overall assessment, the Employee appeared to be a pleasant, affable and intelligent young man. Unfortunately, he appeared to have misguided himself as to the significance of his role in so far as he was required to be an ambassador promoting the Employer's policies and rules to the extent that he would be required to suppress his own positions wherever they conflicted with those of the Employer.
16. In our application of the statutory test of reasonableness, it is most instructive that the Employer ultimately came to the conclusion that it could no longer repose the requisite trust and confidence in the Employee to perform his duties in a professional and exemplary manner so as to uphold the Employer's policies and rules. In other words, as we understand it, the Employer concluded that the

Employee had fallen into a serious breach of the fundamental implied term for mutual trust and confidence, without which the employment relationship could not reasonably be expected to continue. Such a breach would justify a dismissal under section C 59 (1) of the Labour Code.

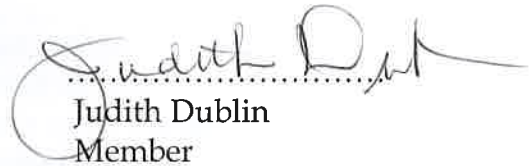
17. In considering the alleged breach of the implied term for mutual trust and confidence, we found ourselves drawn increasingly away from the narrow confines of the admitted breaches of Rule 4:11 towards a wider consideration of some other well-known implied terms of the employment agreement, most if not all of which fall under the broad heading of the Employee's duty of fidelity, a breach of which could undermine and possibly destroy the employment relationship.
18. As to the closing submissions, learned Trade Unionist, Mr. James passionately focused on the procedural defects in the manner in which the Employer handled the evolving situation leading up to the dismissal. According to him, in the absence of a clearly expressed policy against intimate relationships, the Employee's admissions amounted to no more than relatively minor breaches of the relevant policy. And, given the operation of the Employer's "cleansing" policy, the procedural defects were sufficient to render the dismissal unfair.
19. On the other hand, learned Counsel, Dr. Cort focused on the wider ramifications of the Employee's misconduct, given his senior position, the nature of the Employer's business, the gender-biased composition of its staff and the extraordinary lengths it had gone through to regulate the behaviours of its staff. According to Counsel, having regard to all the circumstances, the continuation of the employment relationship was so untenable that it had to be terminated. And as a result, the dismissal was not unfair.
20. In the final analysis, we prefer learned Counsel's submissions. In our opinion, the Employer passed the test of reasonableness. It responded reasonably when it dismissed the Employee. In other words, having concluded that the employment relationship could not continue, the Employer's response fell squarely within a band of reasonable responses which a reasonable employer would adopt in the circumstances.
21. In our estimation, having particular regard to the Employee's bold and calculated assertions directly to the senior management team at the meeting on December 20, 2018, a fairer or better disciplinary procedure would have made no difference to the eventual outcome of summary dismissal.

22. In the premises, we are constrained to declare that the dismissal was not unfair and dismiss the Employee's claim with no order as to costs.

Dated this 16th day of June 2023



Charlesworth O.D. Brown
President



Judith Dublin
Member

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Dalmer A. McCoy
Member

