

ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMEBER

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/8 of 2021

BETWEEN:

JEMORE JEREMIAH

Employee

and

EASTERN CARIBBEAN AMALGAMATED BANK

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John H. R. Benjamin

Member

The Hon. Dalma A. McCoy

Member

Appearances:

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

Ms. Stacy A. Richards and Mr. Kemar Roberts Richards & Company Attorneys-at-Law, for the Employer

2023: March 6 / May 26

Employee suspended without pay – Employer not carrying out proper investigation and failing to adopt fair procedure – Whether suspension unfair.

Section C 10 of Labour Code – Requirement for statement of precise reason for dismissal - Employee receiving 3 warning letters on the same date in respect of alleged infractions committed 5 and 3 months earlier – Reasons for dismissal categorized as unsatisfactory performance and misconduct – No particulars of unsatisfactory performance and / or misconduct stated in dismissal letter – Whether dismissal unfair

JUDGMENT

Brown, P:

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Overview

1. An employee's right not to be unfairly dismissed was established by Section C 56 of the Antigua and Barbuda Labour Code. Given that statutory foundation, in cases where it admits that it dismissed an employee, the burden is on the employer to prove, on the balance of probability, that the dismissal was not unfair. The evidentiary burden has two components. To that end, under section C 58 (1) the employer must first prove that it has a good reason with a sound



factual basis for the dismissal. Secondly, if it meets that threshold, under section C 58(2) the employer must also prove that it acted reasonably in effecting the dismissal.

2. In order to substantiate the factual bases of a dismissal, the employer must provide the employee with a written statement, normally in the form of a dismissal letter, setting out the precise reason therefor in accordance with section C 10 (1). Where the Employer issues such a statement, pursuant to section C 10 (3) he is conclusively bound by it at the trial in respect of the determination as to whether or not the dismissal was unfair.
3. The Employee commenced his employment with the Employer - a prominent financial institution conducting commercial banking in Antigua and Barbuda - on December 17, 2010 as the Attendant I -Facilities Support. His last salary was \$3,485.12 per month which he received in two fortnightly instalments of \$1,742.56.
4. The Employee was suspended for five working days without pay "for serious misconduct" directed towards the Senior Manager Human Resources on Friday, February 28, 2020. The suspension was confirmed by letter dated March 2, 2020.
5. By letter dated June 30, 2020, the employee was suspended, with pay, for the period July 1 to July 8, 2020, to allow the Employer to continue an investigation. Based on its conclusions from the investigation, by letter dated July 10, 2020, the Employer offered the Employee a separation package which he rejected. After negotiations towards agreement on a separation package proved unsuccessful, it was agreed that the Employee would remain away from work up to July 20, 2020. Upon his return to work on July 21, 2020, the Employee was dismissed with immediate effect.
6. By his Reference of Complaint and Memorandum of Claim in these proceedings the Employee raised and maintained the main issues of (a) unfair suspension for the period March 2 to March 6, 2020, and (b) unfair dismissal on July 21, 2020.

Discussion

The Suspension

7. In **Reference 56 of 2016 Otis Teague vs Antigua Public Utilities Authority**, this Court considered the question of unfair suspension. For present purposes, it will suffice to note that, as with question of unfair dismissal, apart from considering the factual basis, the test to be applied when the question of unfair suspension arises is whether or not under the circumstances the employer acted reasonably in suspending the employee.

8. The reason for the Employee's suspension, without pay was "serious misconduct" directed towards Mrs. Alicia Brazil-Ashton, the Senior Manager - Human Resources, on February 28, 2020. As confirmed by the letter dated March 2, 2020, the suspension took effect on the same date and lasted until Friday March 6, 2020, a total of 5 working days. As we understand the suspension letter, the particulars of the grounds for suspension are:
- (a) On February 28, 2020, when the Senior Manager called him by telephone to inform him of a meeting planned for March 2, 2020, the Employee "repeatedly interrupted" the Senior Manager and "continuously stated" that he would not be attending the meeting and that he wanted to speak to his Union Representative. During the telephone conversation the Employee was told that the purpose of the meeting would be to discuss his 2019 performance appraisal and his erroneous delivery of a package. Upon the Employee's request, it was agreed that his Union Representative would attend the meeting.
 - (b) Later the same day, according to the Employer, while the Senior Manager was walking in the parking lot, the Employee "disrespectfully and repeatedly shouted to her from across the parking lot" that he would not be attending the meeting. Further with "his hands raised and pointed in her direction", the Employee "angrily grumbled some other words" which were not understood by the Senior Manager.
 - (c) When the Senior Manager walked across the parking lot towards the Employee, he "was still angrily saying words" to mean that he would not be attending the meeting. In response, the Senior Manager repeated the time and place for the meeting and the requirement for him to attend. While she was still speaking to the Employee, he "turned and walked away from her presence". Moreover, despite her calls to him to indicate that she was still speaking to him, he continued to walk away. Two other employees witnessed the Employee walking away.
 - (d) The Employer interpreted the Employee's words and actions to mean that he had "breached the Bank's Disciplinary Policy which identifies insubordination as a work related offence" and defined it as "abuse or hostility directed at a supervisor or Senior Officer".
9. As a result of the foregoing sequence of events, the meeting previously planned for March 2, 2020, to discuss the Employee's 2019 performance appraisal was rescheduled to March 9, 2020, when he was due to return to work after the suspension. In its stead, the meeting which actually took place on March 2, was

wholly concerned with the situation which developed in the parking lot. At the end of the meeting, the Employee was penalized with the suspension.

10. In the Suspension Letter, the Employer paints a picture of a rude, insubordinate and angry Employee acting in flagrant breach of the Disciplinary Policy. On the other hand, by means of his Memorandum, Witness Statement and Oral Testimony, the Employee paints himself as being calm, respectable, and cooperative. Apart from painting himself in that light, the Employee took issue with the following, all of which were rightfully and meticulously emphasized by his Representatives, Messrs. James and Leonard, in their closing submissions:
 - (a) Prior to the meeting on March 2, 2020, the Employee was unaware that he had offended the Senior Manager to the extent that a complaint was lodged against him and for which he could have faced disciplinary action.
 - (b) In any event, the Employee denied that he acted in the manner described by the Employer in its letter dated March 2, 2020.
 - (c) Prior to the commencement of the meeting, the Employee was not confronted by the Senior Manager or anyone else and given any particulars of the allegations against him. Moreover, he was not given an opportunity to be represented and to properly prepare and state his case in his own defence in response to what was alleged against him.
 - (d) The Senior Manager herself presided over the meeting and "acted as judge, jury and executioner" in the matter in which she was herself the accuser or complainant.
 - (e) The Employer carried out no or no proper investigation of the matter. Indeed, the other employees who allegedly witnessed at least a part of the incident did not issue any statements, of which the Employee was aware, and were not called as witnesses.
11. At this point, it may be useful to underscore that the ultimate test of reasonableness in relation to dismissals is equally applicable to suspensions. The test as to whether a suspension is unfair is whether or not under the circumstances, his Employer acted reasonably or unreasonably in suspending the Employee.
12. We do not think it necessary to further particularize the statutory provisions or the evidence. Suffice it to say, it is our opinion that the Employer's action in suspending the Employee as it did was unreasonable under the circumstances. Accordingly, we declare that the Employee was unfairly suspended and is

entitled to compensation equivalent to the portion of his salary for one week which was withheld during his suspension.

The Dismissal

13. Given the statutory framework, the dismissal letter is the obvious starting point towards the determination of the reason assigned by the Employer for the dismissal. The matters expressly stated, are as follows:
- (a) The Employer's opening gambit is that the Employee's employment was terminated **"pursuant to C 59 (5) and C 58 (1) (e) of the Antigua and Barbuda Labour Code"**.
 - (b) The opening paragraph continues: **"The grounds for your termination are unsatisfactory performance of your duties and responsibilities which demonstrate that the relationship cannot reasonably be continued"**.
 - (c) The Second paragraph of the dismissal letter reads:
"As you are aware, the Bank has had to consistently address with you, over a period of time and, in the presence of a Shop Steward and/or representative from the Antigua and Barbuda Workers Union when required, numerous matters. Chief among these matters are your poor performance. We draw your attention to the most recent work/ performance related incidences which occurred on the 10th and 12th of March, 2020 and which resulted in warning letters dated the 8th day of May, 2020 being issued to you. Following those warning letters in May, 2020, you once again failed to perform your function in an acceptable manner on June 26, 2020."
 - (d) The Third and fourth paragraphs deal with the Employer's expectations and the need for the Employer to have confidence in the Employee, the provision of requisite tools and guidance, despite which there had been no improvement in his job performance.
 - (e) The Fifth paragraph of the dismissal letter reads:
"Coupled with the above performance related issues, your overall misconduct/behaviour has been unacceptable and to such a degree that the Bank has a duty and responsibility to protect itself, customers and stakeholders and to not be exposed to financial and damaging reputational risks."
14. Our perusal of the dismissal letter reveals the categories or types of reason for the dismissal to be principally poor performance and secondly, misconduct. Notwithstanding the references to the previous "work/performance related incidences", the "warning letters" and his failure to perform his function

satisfactorily, there is no statement of the precise reason or reasons for the dismissal. Neither the alleged poor performance nor the misconduct are particularized much less substantiated. Thus, it appears to us that the Employer was in no position to establish and rely on a factual basis, as stipulated in the crucial proviso in section C 58 (1) or any statement of any precise reason as is required in section C 10.

15. In order to fully appreciate the nature and effect of the Employer's failure to state the precise reason for the dismissal, we find it instructive to briefly consider the evolution of the interpretation and application of section C 10 as follows.
16. In References No. 44 and No. 46 of 1991: Margaret Berridge and Dave Edwards v Benjies Business Centre, in dismissing the employees, the employer loosely stated the reason for dismissal was **"misconduct on the job in that you were seen committing an indecent act on your employer's premises during working hours"**. When the matter first came up for trial in this Court, a preliminary application was made on behalf of the Employee in respect of the Employer's failure to state the precise reason for the dismissal. This Court noted the Employer's failure to meet the statutory requirement for a precise reason. Accordingly, it granted the application and thereby estopped or barred the employer from introducing any evidence at the trial as to the reason for the dismissal.
17. Being dissatisfied with that outcome, by Civil Appeal No. 2 of 1993, the Employer successfully appealed to the Court of Appeal which held that the broad description of "misconduct" and "an indecent act" were sufficient to meet the statutory requirement for a precise reason. By its majority - 2 to 1 - decision, the Court of Appeal was of the opinion that it was not necessary for the Employer to recite the "lurid details" of the alleged misconduct or the indecent act. In particular, it was held that the employee was not entitled to a written statement of the precise reason "if the employer had already furnished him with that written statement". In the end, the Court of Appeal overturned the ruling of this Court and remitted it "for retrial and determination on its merits".
18. The employees did not rest. They were comforted and emboldened by the dissenting judgment. By Privy Council Appeal No. 51 of 1995, they appealed to the Judicial Committee of Privy Counsel. Ultimately, after careful consideration of the relevant sections of the Labour Code and the submissions of Counsel, their Lordships rejected the employer's suggestion that they had been ambushed, allowed the appeal, thereby setting aside the judgment of the Court of Appeal, and restored the ruling of this Court.

19. Thus, the position in relation to the statement of the precise reason became and remains well settled. Accordingly, we are of the firm opinion that neither the assertions of "poor performance" nor "misconduct" nor anything else as expressed in the dismissal letter were sufficient to satisfy the requirement for a precise reason under section C 10. The Employer in the instant case, like any other, is conclusively bound under subsection C 10 (1) and must suffer the punitive consequences of subsection C 10 (4).
20. That conclusion, by itself provides a sufficient foundation for the determination of this matter in favour of the Employee. However, in passing, we acknowledge the closing submissions of Learned Counsel and the Employee's Representatives The Latter, as presented by Messrs. James and Leonard, are more comprehensive and convincing. They underscore several aspects of unreasonableness which would, in any event, tend to render the dismissal unfair.

Declaration and Order

21. For the reasons stated above, **we declare that the Employee was unfairly dismissed and is entitled to compensation and costs which we award as follows:**

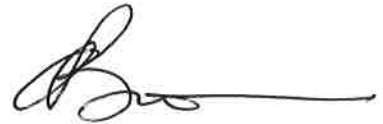
- a. Loss due to Unfair Suspension
We award the sum of **\$824.26**, the equivalent of one week's pay, as compensation for his loss of income during the period of suspension.
- b. Notice Pay
We award the equivalent of one month's salary in the sum of **\$3,485.12** as payment in lieu of notice
- c. Loss of Protection
We award the sum of **\$33,701.11**, being compensation for loss of protection for 9.67 years of service at the rate of one month's pay per year of service.
- d. Immediate Loss
We award the sum of **\$20,910. 72**, the equivalent of 6 months salary, as immediate loss of earnings for the six-month period immediately after the dismissal.
- e. Exemplary Damages
By reason of the harsh and oppressive nature of the dismissal and the Employer's disregard for provisions of the Labour Code and the principles and practices of good industrial relations, we award the sum of **\$10,000.00** under this heading.

f. Costs

We award the sum of **\$2,000.00** on account of the exceptional reasons disclosed at trial

22. In the premises, we order that the Employer shall pay the aggregate sum of **\$70,921.21 to the Employee as compensation - for his unfair suspension and unfair dismissal - and costs no later than June 30, 2023.**

Dated this 26th day of May 2023



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Charlesworth O.D. Brown
President



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John H. R. Benjamin
Member

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Dalma A. McCoy
Member

