

ANTIGUA AND BARBUDA



IN THE INDUSTRIAL COURT

REFERENCE NO. C/ UD/1 of 2023

BETWEEN:

SHENELL GREENE

Employee

And

FOOD BROKERAGE SERVICES LTD

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. Samantha May-Francis

Vice President

The Hon. Dalmer McCoy

Member

Appearances:

Mr. Anderson Carty of the Antigua and Barbuda Tradesmen & United Workers' Federation for the Employee

Mr. Septimus Rhudd of Rhudd & Associates, Attorneys-at-Law for the Employer

2023: September 18

October 6

Implied terms imposing duties of fidelity and mutual trust and confidence- Employee's intimate partner employed by Employer's competitor - Employee sharing personal vehicle and being in presence of partner during course of employment - Employee refusing to divulge identity of partner's employer - Employer concluding that Employee guilty of engaging in conflict of interest and causing Employer to lose trust in her - Employee summarily dismissed upon returning to work after two-week vacation - Whether dismissal unfair - Whether Employee contributed to the dismissal.

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JUDGMENT

Brown, P

Background

1. The Employer is a family-owned company incorporated under the Laws of Antigua and Barbuda. Its primary place of business is situate at Friars Hill Road in the Parish of St. John and it is engaged in the importation, wholesale distribution and retail sale of a wide range of food and grocery items. Its corporate brand, FBS, and trade name, Billy's Food Mart, are widely known throughout Antigua and Barbuda.

2. The Employee commenced her employment as a Merchandiser on or about September 28, 2018. She was paid wages of \$484.00 and a Vehicle Allowance of \$88.00 per week. Her job description, which was delivered to her with her letter of employment dated September 25, 2018, describes her duties and responsibilities as follows:

*"1. Displaying of our goods on our customers' shelves in a tidy and attractive manner
2. Ensure that the shelves on which goods are displayed are dusted and properly cleaned
3. Ensure that goods are properly tagged with correct price, and/or are properly aligned with the correct price on the shelf
4. Bring to the attention of your supervisor any of our goods that may not be in the customers' place of business
5. Pay utmost attention to the 'best before dates' and ensure the proper rotation of all goods displayed on customers' shelves and in customers' storage.
6. Make note of and report to supervisor any goods that are within 2 weeks of expiration dates, and also any damaged goods found whilst carrying out duties.
7. Listen to the comments of customer while carrying out your duties and report those comments to you supervisor so that they can be used to improve our business
8. Any other duties that may be relevant to the job."*

3. The Employee was dismissed by letter dated December 10, 2021 in which the Employer stated:

"Dear Miss Greene

On more than one occasion you were observed with a passenger in your vehicle when you reported for duty in the mornings.

Upon returning to work on Monday 6th December 2021 after being on vacation, you were asked by the General Manager/Managing Director accompanied by the Operations Manager, in a meeting about the passenger that was seen in your vehicle while you were still on company time since on another occasion you were seen as a passenger in the cabin of a sales van accompanying the same person with whom you were seen with on the premises.

In the meeting of mentioned date, you indicated that the person with whom you were with was your partner and that you transported him on more than once to Pigott's village before going to your Food Brokerage Services assigned customers. You were further asked if he worked for a business similar to FBS and you responded that he did; you refused to provide the name of the entity for whom he worked when we asked you to do so. You were invited to another meeting on Tuesday 7th December this time you met with the General Manager/Managing Director and the Human Resources Manager. You again acknowledged that you took your partner to work, and you have accompanied him, although not many times, when he is on duty. You also admitted to accompanying him on your personal time to your FBS assigned customers although you claim to have waited in the vehicle while he approached the customer.

In both meetings you were advised that your action is a conflict of interest as accompanying a sales person from a competing business in a position competitive to yours, to customers assigned to you is unacceptable.

Taking into consideration the very competitive environment within which we operate and your failure to recognize the conflict of interest in your actions, it is extremely difficult for us to continue to trust you and reasonably continue with the working relationship. Your last day in the employ of Food Brokerage Services Ltd is today 10th December, 2021.
... ”

The Opposing Positions

4. By her Memorandum of Claim filed on January 25, 2023, the Employee contends that she was unfairly dismissed. The grounds of her contention are:
 - a. The person seen with her in her personal vehicle was her common law partner with whom she lived and shared her vehicle;
 - b. At the first meeting on December 6, 2021, apart from refusing to divulge the name of her partners employer, she fully explained the circumstances surrounding his presence in her vehicle from time to time;
 - c. She was dismissed at the second meeting because of the Employer's erroneous conclusion that her "personal relationship" amounted to a "conflict of interest".
5. By its Memorandum of Defence filed on July 3, 2023, the Employer disputes the Employee's claim of unfair dismissal on the following grounds:
 - a. The Employee was frequently seen in the company of a sales representative of one of its rivals and was often in his company during the course of her employment and while he was making deliveries to some of its customers;

- b. Based on its concern that there was a potential conflict of interest which could undermine its business, the Employer convened a meeting to gather information from the Employee in order to assess the risk to which it was exposed. The Employee confirmed that the person with whom she was seen was in fact employed by one of the Employer's competitors;
 - c. The Employer concluded that the Employee was engaged in an unacceptable conflict of interest which could affect her employment.
 - d. The Employee failed or refused to heed the Employers concern. As a result, the Employee was dismissed by letter dated December 10, 2021.
6. Upon filing this Reference, the Employee identified the main issue between the parties as Unfair Dismissal. It follows that, based on those pleadings, the main question to be answered is whether or not the Employee's conduct: (i) resulted in a "conflict of interest"; (ii) made it "extremely difficult" for the Employer to trust her; and (iii) made it "extremely difficult" for the Employer to "reasonably continue with the working relationship".

The Legal Framework

7. Generally, matters involving pleadings and core facts similar to this Reference - where one or the other party rely on the existence of an employee's conflict of interest, an employee's breach of trust or an employee's competition with his employer - hark back to the common law principles which were not expressly codified in modern legislation. For present purposes, we will adopt the approach taken by this Court in **Reference No. 24 of 2017 Faith Piggot v. Woods Pharmacy Ltd.** which followed **Reference No. 5 of 1994 Alexander John v. Peter Reitz t/a Caribbean Dental Services** and, more recently, was followed in part by **Reference No. 4 of 2017 Glenroy Francis v. Illuminat (Antigua) Limited and or Massy Technologies Infocom (Antigua) Limited** and **Reference No. 41 of 2020 Asarni Thomas v. Client Communications Services Inc.**
8. In the **Piggot case**, the Court stated:
14. On the core facts of this case, the obvious starting point for the determination of the main issue - whether the Employee was unfairly dismissed - is the law regarding the employment relationship. 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...”

Discussion

9. The Employee's testimony is consistent with her Memorandum. She testified that she was “surprised” when the Employer's Managing Director, Mr. Leslie Salmon, first “confronted” her on December 6, 2021, the day she returned to work after her two-week approved vacation about “a gentleman” that was seen in her vehicle. She also testified that she explained that it was her partner whom she was giving a ride to Piggotts. She further testified that when asked specifically and repeatedly where he worked, she refused to divulge that information.
10. The Employee also testified that at the material time, her partner worked for one Mr. Hall, (whose full name she could not then recall) and was engaged in the sale and distribution of goods including food and household items which were similar to those the Employer was selling.
11. Moreover, the Employee testified that in her opinion, her refusal to divulge the information as to her partner's employer was reasonable since she did not think such refusal would affect the Employer's ability to trust her. In any event, according to the Employee, she simply did not see the need to tell the Employer where her partner worked. Mr. Salmon never told her that the Employer was not able to trust her in the circumstances.
12. Further, the Employee testified that at the meeting on the following day, December 7, she again repeatedly refused to disclose the name of her partner's employer because it was not her information to give.
13. It is clear that there is no significant variance between the Employee's account or the one hand and those of Ms. Laurine Richards, the Employer's Human Resources Manager, and Mr. Salmon on the other hand. Not surprisingly, each party tended to highlight certain facts while suppressing others. In the

circumstances, we find that the Employer's account, as recited in the dismissal letter, to be largely accurate.

14. Having stated that, we also made other instructive findings of fact. Firstly, Ms. Richards testified that the Employer had "no spell out of a 'conflict of interest' policy". By that statement, we understand her to say that the Employer did not have a written policy in respect of the avoidance, disclosure and handling of conflicts of interest between itself and its employees.
15. Further, Ms. Richards testified that at the meeting on December 7, 2021, "the Employee was informed that her actions amounted to a conflict of interest and was deemed unacceptable ... Ms. Greene did not see this as a conflict of interest"
16. In addition, under examination-in-chief, Ms. Richards also testified that "the Employer is of the honest belief that the actions of the Employee served to undermine the operations of the Employer ... the Employer is firmly of the view that the termination was warranted as no reasonable employer could be expected to continue the relationship".
17. Secondly, Mr. Salmon testified that prior to the meeting on December 6, 2021, when the Employee returned to work after her two-week vacation, his curiosity was peaked when he observed the Employee doing certain "sales" with a man from a 'van". He also testified that he also observed a person who looked like the same man in the Employee's vehicle.
18. Mr. Salmon also testified that at the start of the meeting on December 6, the Employee's job "was not in jeopardy". He said that the meeting was merely a "fact-finding" one, just to allow himself to find out certain things and to "get a feel of what was happening". Further, Mr. Salmon stated repeatedly that prior to that meeting, he had no issues with the Employee and never received any negative report about her.
19. Moreover, Mr. Salmon corroborated Ms. Richards' testimony that the Employer had no written policy on conflicts of interest and that the Employee did not see her actions as amounting to a conflict.
20. The legal framework outlined at paragraphs 7 and 8 above must be read and understood in the context of the development of employees' rights and employers' obligations with the advent of the Antigua and Barbuda Labour Code and the Industrial Court Act. Thus in applying the fundamental common law principles, care must be taken to have due regard for the letter and spirit of the relevant statutory provisions.

21. It cannot be overemphasized that a dismissal will be held to be unfair unless (a) the employer establishes a sound reason with a good factual basis therefor AND (b) prove that it acted reasonably in dismissing the employee under the circumstances. The onus is on the employer to prove that the dismissal was not unfair.
22. In our opinion, there is no doubt that the real, perceived or potential conflict of interest and a breach of the implied term for mutual trust and confidence are valid reasons with good factual bases falling under section C 58 (1) (e) of the Labour Code.
23. In relation to the test of reasonableness under section C (58) (2) of the Labour Code is extremely pregnant with the requirements of natural justice and the related policies and practices of good industrial relations practices. As a matter of fact, proof of reasonableness is an evidentiary burden to be discharged by the employer in cases testing the fairness of a dismissal.
24. Needless to say, each case turns on its own facts. As far as is possible, based on the evidence, all the surrounding circumstances must be taken into consideration. In this Reference, it is our opinion that the following facts and circumstances militate against the Employer's proof of reasonableness:
 - a. The Employee's personal circumstances in life, including her intimate relationship with her partner and the use of her personal vehicle, were intricately and inextricably bound up with the allegations against her;
 - b. The Employee did not deliberately engineer or engage in a conflict of interest situation;
 - c. The Employee was confronted without prior notice immediately upon her return from her two-week approved vacation in respect of a concern which predated her vacation;
 - d. The Employer had no conflict of interest policy against which it could measure the Employee's breach;
 - e. The Employer had on its staff other employees who were, more or less, engaged in similar conflict of interest situations;
 - f. The Employee had difficulty in appreciating the nature and severity of the allegation of breach of the implied terms for fidelity and mutual trust;
 - g. The Employee had no history of misconduct. Prior to her dismissal, the Employer had received no adverse report against her;
 - h. Up to the date of her dismissal, the Employee was not aware that her employment was in jeopardy;
 - i. The allegations against her, their seriousness and potential effect were not brought home or sufficiently brought home to the Employee in writing or at all;

- j. The Employee was dismissed summarily after a mere fact finding meeting without any adequate opportunity to advance her position as to why she should not have been dismissed.

25. In the final analysis, we conclude that the Employer failed the test of reasonableness and by natural extension failed to prove that the dismissal was not unfair. Accordingly, we declare that the Employee was unfairly dismissed and is entitled to compensation.

26. However, we also find that by her actions the Employee contributed to her dismissal. Based on our assessment of the relevant facts, we fix her contribution at 40% by which percentage we will reduce her compensation which we will assess below.

Compensation

27. In the premises, we assess compensation as follows:

(a) Notice Pay

\$484.00, the equivalent of one week's wages

(b) Loss of Protection

\$3,775.20, the equivalent of 39 days' wages

(c) Immediate Loss

\$7,436.01, the equivalent of 3 months' emoluments

28. Taking her 40% contribution into account, the Employee is entitled to the net sum of \$7,017.13

Order

29. And we order that the Employer do pay the sum of **\$7,017.13** to the Employee, as compensation for her unfair dismissal, no later than October 31, 2023

Dated this 8th day of October 2023



Charlesworth O. D Brown
President



Samantha May-Francis
Vice President



Dalmer McCoy
Member