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ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/20/2017

BETWEEN:

COSIER LEWIS

Employee

and

JUMBY BAY RESORT LIMITED

Employer

Before:

The Hon. Samantha May- Francis

The Hon. John Benjamin

The Hon. Judith Dublin

Vice President

Member

Member

Appearances:

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

Mrs. Nelleen Rogers Murdoch of Simon Rogers Murdoch, Attorneys-at-Law for the Employer

2021: December 1

2022: February 21

2023: February 20

June 23

Suspension- whether the Employer unlawfully suspended the Employee- Dismissal- unfair Dismissal - Whether the Employee was denied natural justice

JUDGMENT

May-Francis, VP

Background

1. At all material times, the Employer was a Company registered in Antigua and Barbuda and conducting business as Jumby Bay Resort, a five-star resort on Long Island on the northeastern coast of mainland Antigua.
2. The Employee was employed on December 10, 2009, and last held the position of Food and Beverage Server for approximately six (6) years until June 11, 2015, when she was dismissed. At the date of her dismissal, she earned a fortnightly wage of \$888.00 plus an average fortnightly service charge of \$1,648.00.
3. At all material times, the position held by the Employee fell within the Bargaining Unit, which was governed by a Collective Bargaining Agreement (the Collective Agreement) between the Antigua and Barbuda Workers Union and the Antigua Hotels and Tourism Association, of which the Employer is a member.
4. On April 8, 2015, the Employee was suspended pending an investigation into an allegation that she disrespected her immediate Manager, Mr. Jimmy Abraham, during an incident on April 2, 2015.
5. The Employer subsequently found that the Employee was rude and insolent to a representative of Management in breach of Appendix 1 Clause 26 of the Agreement and determined that the Employee should be suspended without pay.
6. According to the April 21, 2015 suspension letter, the Employee's infraction warranted dismissal. However, the Employer was lenient and suspended the Employee for five (5) days.
7. On June 11, 2015, the Employer once again suspended the Employee pending an investigation into an incident in the staff cafeteria in which it was alleged that the Employee intentionally struck a plate of food from Mr. Eustace Cabral's (the Cook) hand while he was serving lunch to other employees.
8. Thereafter and having completed its investigation into that allegation, the Employer, by letter dated June 16, 2015, dismissed the Employee pursuant to Section 59 (1) (a) of the Antigua and Barbuda Labour Code (the Labour Code) and Appendix 1 of Clause 26 of the Agreement, alleging that the Employee engaged in misconduct so serious that the employment relationship could not continue.
9. By the Reference filed on March 1, 2017, the Employee claims that she was unlawfully suspended, unfairly dismissed and is entitled to compensation. On the contrary, the Employer contends that it had good grounds for suspending and eventually dismissing the Employee.

10. In her Memorandum of Claim, the Employee contends the following:
- (a) the Employer unlawfully suspended her on April 21, 2015;
 - (b) the suspension letter dated April 21, 2015, did not state the period of suspension;
 - (c) the Employer has unlawfully withheld five (5) days' pay from her
 - (d) the suspension on June 11-14th, 2015, related to the incident on June 11, 2015, was without pay;
 - (e) the Employer denied her natural justice by failing to afford her the opportunity to attend any meeting involving Mr. Cabral or any other witness that was present at the time of the incident; and
 - (f) the Employer's actions to suspend and dismiss her were extreme, harsh and oppressive, considering the circumstances surrounding the incident.
11. The Employer disputes the Employee's Claim and contends the following:
- (a) the Employee's suspension on April 21, 2015, was for rudeness or disrespect to a representative of Management;
 - (b) that the Collective Agreement provides insolence or rudeness as a cause for dismissal;
 - (c) before the June 11, 2015 incident, the Employee had returned to work for several weeks following the suspension in April and made no complaint or took no action against the Employer for the suspension she now claims to be unlawful.
 - (d) the Employee accepted the suspension;
 - (e) the Employee had been warned six (6) weeks prior that any subsequent conduct involving rudeness or disrespectfulness to Management would lead to further disciplinary action, which may result in her being dismissed;
 - (f) the dismissal of the Employee on June 16, 2015, followed an investigation and a disciplinary hearing. During the hearing, the Employee was given an opportunity to be heard;
 - (g) it was only after the Employee was shown a video recording of the incident she admitted that she had intentionally knocked the plate out of Mr. Cabral's hand on the second occasion;

- (h) additionally, having reviewed the recording of the incident, the Employee was found to be untruthful in her account that her first attempt to knock the plate from Mr. Cabral's hand was an accident; and
- (i) the Employee is not entitled to compensation as she was lawfully suspended and fairly dismissed.

Issues

- 12. Having regard to the Parties' contention, the main issues arising for our determination are- whether the Employee was unfairly suspended on April 21, 2015, and whether the Employee was unfairly dismissed.

Resolution

Suspensions

- 13. In considering the Employee's claim for unfair suspension, we refer to this Court's decision in **Otis Teague v Antigua Public Utilities Reference 56 of 2016**, where President Charlesworth Brown stated: **" It is clear that the 1998 Amendment significantly broadened the scope of complaints to include one of "unfair suspension without pay" under section B12(1) (b), as amended. It is clear that quite separate and apart from complaints of unfair dismissal, there now exists a new category of complaints of "unfair suspension" in cases of suspension without pay".**
- 14. On April 8, 2015, by letter of even date, the Employer suspended the Employee for five (5) days pending investigation into an allegation that she had disrespected Mr. Abraham. We note that although the correspondence says the suspension was for three (3) days, the duration of the suspension, as indicated in the suspension letter, was five (5) days. The relevant parts of that suspension letter are hereby reproduced and read:

" ...

Dear Cosier:

We have received a report that on April 2, 2015, there was an incident with your manager Jimmy Abraham where you were requested to remove a tray of dirty plates and an argument ensued [sic] where you were disrespected [sic] and had to be sent home before your shift ended.

While the matter is being investigated, you will be placed on suspension for three (3) days pending the outcome of the investigation of this matter. If the decision after the period of suspension and investigation is that suspension is the punishment then no payment will be applied to the period of suspension. Your period of suspension will be from Wednesday, April 8th -

Sunday, April 12, 2015. Your schedule will be adjusted to reflect such. You will therefore be contacted by Human Resources on or before Monday, April 13, 2015 with an update on the matter."

15. Mr. Carty submitted that the suspension in itself was inherently unlawful. He argued:
- (a) the Employer's suspension policy is inconsistent with the Labour Code, case law and good Industrial Relations practices;
 - (b) the Employee was not afforded due process, nor was she aware that when she met with the Assistant Food and Beverage Manager on April 8, 2015, it was a disciplinary hearing;
 - (c) despite being on investigative suspension, the Employee was never called during the investigation;
 - (d) the Employee's suspension was initially without pay, but if exonerated, would be paid;
 - (e) after completing its investigation, the Employee was found to have breached the Collective Agreement Clause 26 – Appendix 1 and was suspended for five (5) days by letter dated April 21, 2015;
 - (f) however, the suspension letter did not state the effective period of suspension;
 - (g) and most fundamental, the circumstances which led to the suspension did not warrant a suspension; and
 - (h) the Employer's actions were unreasonable.
16. Mr. Carty relied on Section 4 of the Antigua and Barbuda Labour Code (Amendment) Act No 16 of 1998, which provides:
- "4. Section B 3 of the principle Act is amended by inserting immediately after the definition of the words "severance pay: appearing therein in the following-**
- "suspension means temporary lay off from work for not more than four weeks with or without pay as a penalty of pending investigation of the employee's alleged misconduct."**
17. He argued that on April 8, 2015, the Employee was suspended without pay and would be with pay if exonerated. Based on the contents of the dismissal letter, the

opposite can be said in that it was an investigative suspension, was with pay, and if the Employee were subsequently found to be in breach, there would be no pay for the period. Having heard the Parties' evidence, we are inclined to treat the Employee's suspension as an investigative suspension with pay which falls within the ambit of Section B3 of the Labour Code. We adopt President Charlesworth Brown's interpretation of Section B3 in the **Otis Teague Case**, in which he stated:

" As expressed in Section B 3, a "suspension" may arise as "a penalty or pending investigation of the employee's alleged misconduct ." As we understand the definition, a suspension may be grounded on either punitive or investigative motives. Each of the two categories may either be with pay or without pay. As a result, there are in fact four distinct types:

- a. A punitive suspension with pay;**
- b. A punitive suspension without pay;**
- c. An investigative suspension with pay and**
- d. An investigative suspension without pay**

Clearly the definition concisely identifies the four types seamlessly and states a single maximum period of 4 weeks."

18. It was not disputed that the Employee had been dancing or jiggging, as Mr. Carty put it, while service was ongoing. There were tables to be cleared and trays to be removed. Mr. Abraham asked the Employee on several occasions to move the trays. She responded and indicated that another Employee, Mario, would clear the table. Mr. Abraham gave evidence that Mario was otherwise occupied, and the Employee was not engaged in any other task that would have prevented her from clearing the tables. His evidence is that he persisted in his instruction. Eventually, the Employee reluctantly commenced clearing the tables. However, by that time, the situation had escalated.
19. We accept that Mr. Abraham may have been forceful and persistent in his instruction that the Employee clear the tables. However, the Employee escalated the situation when she, by her admission, told Mr. Abraham not to speak to her. This was the Employee's ultimate response to the repeated instructions from her Manager. Mr. Abraham testified that the Employee's behaviour was unacceptable and showed no respect for his authority. He thought she was not in the frame of mind to work and therefore asked her to leave for the rest of her shift.
20. We find that the Employee was unwilling to carry out the instructions given to her by Mr. Abraham, and her response from start to finish demonstrated an intention to defy the instructions given to her and Mr. Abraham's authority. It is clear that she was angry as Mr. Abraham would not accept that Mario would clear the

tables. Ultimately, she behaved badly because she was angry. This is supported Mr. Abraham's evidence which we accept. The very nature of the complaint was sufficient cause for the Employer to suspend the Employee pending an investigation.

21. We now examine the reasonableness of the Employer's action to suspend. The Employee contended that she was unaware that the meeting with the Employer on April 8, 2015, was a disciplinary hearing and therefore did not have the benefit of a representative. She further contends that she was not contacted during the investigation, suggesting that the Employer did not conduct a full and impartial hearing, resulting in her being denied natural justice.
22. It has been well settled in case law that the absence of a fair hearing does not automatically render the dismissal unfair. The same holds in respect of a claim for unfair suspension. We did not have the benefit of the disciplinary procedure as agreed to in the Collective Agreement to assist us in determining whether the Employer followed the established and approved policies. However, based on evidence, the Employer met with the Employee before the April 8, 2015, suspension. The Employee explained and confirmed that the contents of the minutes were accurate by affixing her signature to the same. We find that the Employer allowed the Employee to put forward her defence and to provide an explanation. In our view, the Employee was given a reasonable opportunity to be heard. We are of the view that there was no breach of natural justice.
23. Therefore, for the aforementioned reasons, we find the Employer acted reasonably when it imposed a punitive sanction and suspended the Employee without pay. We note that the undisputed evidence is that the Collective Agreement provides a stiffer sanction of dismissal, but the Employer chose to impose a suspension.
24. However, there were some fundamental missteps and failures on the Employer's part. On April 21, 2015, the Employee, was issued with a suspension letter advising her that the Employer, having concluded its investigation, had found her to be in breach of the Collective Agreement in particular "Clause 26 (appendix 1-21) **"Insolence or rudeness to a representative of Management"** and for which she was suspended for five (5) days. The Employer failed to stipulate the period of the punitive suspension, resulting in the Employee not knowing the period for which she was suspended; she did not know when the five (5) days started and ended.
25. Notably, having arrived at a definitive position that the Employee was guilty of wrongdoing and imposing a sanction of five (5) days suspension, rather than suspending the Employee further, the Employer did not pay the Employee for the period she was on investigative suspension. By then, the investigative suspension

had come to an end. The Employer altered its position and treated the investigative suspension with pay as punitive suspension without pay for the same period.

26. It is our opinion the Employer acted unreasonably in doing so. We cannot reconcile the Employer's actions with the principles of good industrial relations practices. It contradicts our understanding of Section B3 and the fundamental principles of fairness and natural justice, which underpins the right of an Employee to know at the time of suspension whether he has been suspended pending investigation or punitively. Additionally, the Employer presented no evidence to convince us that the Collective Agreement supports such a suspension policy. The Employer's recourse was to suspend the Employee further, having determined that the sanction was five (5) days without pay.
27. Under cross-examination, the Employer's witness Ms. Isha Joseph, Human Resource Manager, gave evidence that the Employee had been suspended for five days without pay. The pay slip evidencing wages paid to the Employee on April 22, 2015, supports that the Employer did not pay the Employee for the period of investigative suspension. Having so found, based on the facts of this case, the remedy to be applied and settled by this Court is to compensate the Employee for loss of wages. The Employee is therefore entitled to lost wages from April 6 to April 19, 2015, in the sum of \$1,712.00.

The Dismissal

28. On June 11, 2015, the Employer received a report of an incident in the staff cafeteria involving the Employee. It was alleged that she had attempted twice to strike a plate from Mr. Eustace Cabral's hand and had succeeded on her second attempt. The Employer suspended the Employee from June 11, 2015, to June 14, 2015. For the same reasons above, we have deemed this suspension an investigative suspension with pay. On June 16, 2015, after completing its investigation, the Employer dismissed the Employee for serious misconduct. The Employer in the dismissal letter on June 16, 2015, stated:

"Your employment with the resort is hereby terminated with effect from June 16, 2015; accrued vacation less all statutory deductions shall be paid pending receipt of the Company issued property, uniforms, employee handbook name badge, ID card and all other company property where applicable".

29. Section C 56 of the Labour Code established the right of an employee not to be unfairly dismissed. Therefore, once an employer admits that it dismissed an employee, as in this Reference, the onus is on the Employer to prove that the dismissal was not unfair. The Employer has assigned misconduct as the good reason for the Employee's dismissal

30. Therefore, the first hurdle the Employer faces is establishing factually that the Employee engaged in misconduct so serious as to warrant a dismissal. Secondly, the Employer must pass the statutory test of reasonableness set by Section C58 (2), proving that it acted reasonably in dismissing the Employee.
31. Mr. Carty submitted that the video recording shows the result of a frustrated and provoked Employee, and hence little weight should be given to the evidence. The video evidence did not capture the alleged first attempt by the Employee to strike the plate from Mr. Cabral's hand, which she stated she merely attempted to grab from Mr. Cabral after he refused to serve her. However, we had the benefit of the video evidence, which clearly shows the Employee striking the plate from Mr. Cabral's hand as he handed it to an employee standing behind the Employee.
32. From the video evidence, it is clear the Employee was agitated. She appeared to be aggressive and deliberate in her actions. The Employee's utterances, tone and mannerisms were heard and observed. Even if we accept that Mr. Cabral provoked the Employee, this is no excuse for the Employee's actions. With eight (8) years of tenure, the Employee must have been aware of the Employer's established and accepted procedures for reporting and handling conflicts at the workplace. However, she chose to respond poorly, caring not for the safety of others and showed no appreciation for the Employer's property.
33. Alarming, from the video evidence, having struck the plate from Mr. Cabral's hand, the Employee appeared pleased and satisfied with her response. She clearly did not appreciate the severity of her actions or was too angry to appreciate the same at that moment. Based on her evidence, she thought nothing would come of the issue as Mr. Cabral had accepted his wrong, and they both had decided not to report the incident.
34. However, that did not preclude the Employer from bringing a charge against the Employee; after all, there are policies which govern the standards and behaviour of employees in the workplace. The Employee must have been aware of the Employer's policies regarding the discipline of its employees. A grim reminder is that on April 21, 2015, she was suspended and warned that any like or similar conduct could result in her dismissal. She ought to have known that an infraction of this nature would not have been tolerated. Having taken the course of action which she did, she evinced an intention not to heed the warnings of the Employer. We note that in the cafeteria were the Employee's co-workers who witnessed this inappropriate behaviour. Based on the nature of the Employee's infractions, this was not an isolated incident and could be described as "the last straw".

35. Therefore, considering the evidence, we do not doubt that the Employer had good cause to dismiss the Employee. Her behaviour was aggressive, violent and intentional without regard for other employees and the Employer's property and its established standards regarding conduct.
36. On another note, Mr. Carty argued on behalf of the Employee that she was not afforded due process in that Mr. Cabral was never questioned as part of the investigation. He also contended that Ms. Goodman was not part of the disciplinary hearing, and there was no proper investigation except for the Employer showing the video recording to the Employee. We are, however, of the view that the conduct of the Employee was so gross and captured by the video recording that if we were to accept that there was no hearing, a hearing would not have made any difference. Similarly, even if Mr. Cabral had given evidence acknowledging that he provoked the Employee, it would not have made a difference in our opinion. The provocation, if any, by Mr. Cabral does not justify the Employee's response, demonstrating a lack of regard for the Employer's property and standards of conduct.
37. Additionally, Mr. Carty submitted that Ms. Goodman, a former employee who used her telephone and recorded a portion of the incident, "passionately disliked" the Employee. The suggestion made by Mr. Carty is that Ms. Goodman had some malice towards the Employee when she recorded the incident. We find this submission far-fetched and was not supported by the evidence, particularly regarding the fact that Ms. Goodman did not initially provide Management with the recording and only did when approached. Having heard Ms. Goodman's evidence, we found her evidence more reliable than the Employee's.
38. We are satisfied that, in this case, the Employee was afforded due process and was dismissed after the matter came to the Employer's attention and an investigation was carried out. The evidence shows that the Employee was allowed to provide an explanation which was recorded and signed by the Employee. She admitted to striking the plate, at least on the second occasion, out of Mr. Cabral's hand. The credible evidence of Ms. Goodman and the video evidence, to the extent of what it depicts, speak for themselves.
39. In answering whether the Employer acted reasonably in dismissing the Employee, we cannot substitute our view for that of the Employer. We, therefore, ask ourselves what a reasonable Employer would have done in the circumstances. While we make no finding that the Employee was wholly responsible for the incident, the end result is that the Employee's actions caused damage to the Employer's property, potentially comprised the security and safety of food and the security and safety of other employees and amounted to physical assault of Mr.

Cabral. This is what the Employer contends in the dismissal letter and is essentially what we accept as the basis for the Employer's decision to dismiss the Employee.

40. Therefore having considered all the evidence and submissions, we accept the Employer's contention that it reasonably dismissed the Employee for misconduct. Indeed, the Employee's dismissal was effected by the Employer as a clear demonstration of the standard and conduct expected of Employees and in accordance with the Collective Agreement and the sanctions therein contained.

41. For the reasons stated above, it could not be said that, in these circumstances, the Employer acted unreasonably.

Order:

42. In the circumstances, we order:

- i. The Employer shall pay to the Employee outstanding wages for the unfair suspension for the period April 6 to April 19 2015, in the sum of \$1,712.00 no later than July 7, 2023.
- ii. The Employee's claim for unfair dismissal is dismissed with no order as to costs.

Dated this 23rd day of June 2023


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Samantha May-Francis
Vice-President

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John Benjamin
Member


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Judith Dublin
Member

