

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/16 of 2019

BETWEEN:

MERLIN WHYTE

Employee

And

JUMBY BAY ISLAND COMPANY LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John R. H. Benjamin

Member

Appearances:

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

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

2023: April 4

2024: February 15

Employee Gardener suspended without pay- Suspension extended pending investigation- Employee voicing concerns about treatment meted out to him- Employee interviewed by Director of Security as part of investigation - Employee not provided with copy of investigative report- Offer of mutual separation package with deadline for acceptance- Employee summarily dismissed after rejecting offer and proposing negotiations- Employer's failure to discharge evidentiary burden at trial

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JUDGMENT

Brown, P

Background

1. The Employer is a registered company providing utility, security and transportation services on the island of Jumby Bay in Antigua and Barbuda. As an employer, it was at all material times, a party to a collective bargaining agreement with the Antigua and Barbuda Workers Union.
2. The Employee commenced his employment with the Employer as a Gardener on December 07, 2015. As a member of the Union, he was paid on a fortnightly basis at the rate of \$146.40 per day or \$732.00 per week.



3. At all material times, the agreed terms for dealing with issues of punctuality, absenteeism and related offences were largely set out in Appendix 1 to the Collective Bargaining Agreement then in force. Moreover, the Employer's related policies and procedures on those issues as well as the issue of misconduct were set out in the Employer's Employee Handbook. Both the Appendix and the Handbook provide for a system of progressive discipline depending on the severity and/or repetition of a particular offence.
4. Under the system of progressive discipline, to which the parties to the Collective Agreement had agreed, the offence of being absent for a day without proper notification is punishable by a reprimand on the first occasion, by a written warning on the second occasion, by a suspension on the third occasion and by dismissal on the fourth occasion.
5. On June 15, 2018, two warning letters were issued to the Employee in respect of several offences. Firstly, the Employer alleged that he had contravened specific offences No. 1.1.1.6 and No. 1.1.1.14, including one for being on the Employer's premises when he was not scheduled to work as stated in the Collective Agreement. Secondly, the Employer alleged that the Employee had contravened the specific offences No. 1.1.1.5, No. 1.1.1.12 and No. 1.1.1.14, including one for eating in an unauthorized area, as stated in the Collective Agreement. Both letters warned the Employee that any repetition of those infractions within the ensuing six months would result in his suspension.
6. On or about September 3, 2018, the Employee spoke to his supervisor, Jepson Prince, requesting a "vacation day" on September 4. According to the Employee, his supervisor told him that he had no problem granting the day off but casually requested that the Employee double check with the Parks Manager, David Stubbs, to ascertain if he had accrued vacation days. It was the Employee's understanding that his supervisor had approved the day-off subject to the Employer's decision as to whether or not he would be paid for the day. The Employee's evidence is that he inadvertently omitted to speak to Mr. Stubbs.
7. The Employee took the day off on September 4, 2018 pursuant to his understanding that his supervisor had authorized him to do so. Further, he did not report to work the following day. According to him, he needed an extra day to deal with a family matter involving his wife and children which had spilled over from the previous day. He testified that he called the Employer twice but was not able to connect with the relevant office.
8. The Employee returned to work on September 6, by which date the Employer had commenced an investigation into his absence the two preceding days. He

was summoned to a meeting at which he was interviewed by the Director of Human Resources, Corina Edwards-Sealy, in the presence of two other managers and the Union's Shop Steward. At the meeting, the Employee explained that his absence was due to the fact that he was dealing with a family matter. Ultimately, by letter of the same date the Employee was suspended with immediate effect, without pay, up to and including Friday, 14th September 2018.

9. The suspension was grounded on: (a) the Employee's failure to contact the Parks Manager as instructed by Mr. Prince (b) his failure to report for work on September 5 (c) his failure, when he returned to work, to say anything about being absent the previous two days. It is noteworthy that the suspension letter states as follows:

Mr. Whyte, while the facts are reviewed you are being placed on suspension effective immediately up to and including Friday 14 September 2018. If the decision after the period of suspension is that termination is penalty, then you shall be paid for period of suspension. If suspension is the penalty, then no payment will be applied to said period of suspension. Please be guided accordingly."

10. The Employee returned to work on September 14, 2018, and was told that his suspension period had not expired. In response the Employee proceeded to leave the Employer's premises. On his way out he visited the office of the Vice President of Operations and Infrastructure, Ian Steele, to express his concerns about the "unfair manner" in which he had been treated. According to the Employee, he "candidly but respectfully complained that he had been 'victimized'. He also intimated to Mr. Steele that he no longer enjoyed his job and wished to be paid off.
11. According to the Employer, during the meeting with Mr. Steele, the Employee made threatening remarks towards members of the management team and stated that he wanted to kill them because of their "wickedness" and "victimization". In addition, the Employer stated that the Employee threatened Mrs. Edwards-Sealy and alleged that the Employer had the Union in its "back pocket".
12. For his part, the Employee denied threatening to kill Mr. Steele or anyone else as he was fully aware that the same would lead to his arrest and deprive him of the opportunity of looking after his two minor children. Moreover, he denied accusing the Employer of wickedness and victimization. As to the comment about the Union/ workers relationship, he admits expressing his view that some union officials had been "selling out" the workers.

13. The Employer decided that, based on the report it had reviewed, it had no choice but to extend the period of suspension to September 18, 2018 and requested that the Employee attend a meeting on September 19, 2018 so that the Employer could hear his side of the matter. By letter dated September 19, 2018, the Employee was further suspended up to September 21, 2018.
14. At the meeting on September 19, 2018 the Employee was interviewed by the Director of Security, Auden Nicholas. In his report on the meeting, Mr. Nicholas stated that the Employee:
- (a) denied that he threatened to kill anyone;
 - (b) stated that he felt victimized;
 - (c) expressed his disappointment at being denied access to his thrift fund or to an advance on his salary for the purpose of assisting with the payment of school fees for his children;
 - (d) expressed his opinion that the Union was under the control of the employer;
 - (e) stated that he did not want to work for the Employer anymore;
15. Moreover, in his report, Mr. Nicholas expressed the view that the Employee “appeared to be under the influence of a mind-altering substance” and his belief that the Employee was “unstable and had serious financial challenges”. Further, Mr. Nicholas expressed his belief that the Employee “did in fact make the threats as alleged by Mr. Steele. Finally, Mr. Nicholas recommended that Employee be “either terminated or severed as it does not appear that he is willing to cooperate with his colleagues, supervisors or managers”.
16. Having reviewed Mr. Nicholas’ report dated September 20, 2018, by letter dated September 25, 2018, the Employer wrote to the Employee setting out a chronology of events and stating its conclusions. The following are excerpts from that letter:
- “ ...
- Management has completed its investigation and has concluded the following:*
- *You were not expected to be on property until 17 September 2018. The meeting on 14 September 2018 was convened solely by you and for purposes;*
 - *This being a meeting you convened yourself, while still on suspension (or at the end of suspension), it is likely to have been convened to air your grievances as you were frustrated at the time and upset about being on suspension;*
 - *You admitted to much of the report even in using the word “pray” but denied that you used it in this context although you admitted to saying you wished to be severed;*
 - *You believe that you are treated unfairly at work by the supervisors, Mr. Steele and by the human resource director and as a result of this you have severe anger and frustration towards your supervisors, Mr. Steele and the human resource director*

whom you think wrongfully denied your access to thrift fund or other financial assistance;

*...
In light of the circumstances stated above, management is of the view that you have committed serious acts of misconduct in or in relation to your employment. These acts have led to a total erosion of the trust and confidence that management should have in you as an employee. They are of so serious a nature that they are a clear demonstration that the employment relationship cannot reasonably be expected to continue. The Company, pursuant to the collective agreement as well as section C59 of the Labour Code of Antigua and Barbuda, has the right to terminate your employment.*

As discussed today, notwithstanding its right to terminate, and in consideration of the fact that you no longer wish to work here and have requested that your employment be terminated and you be paid your severance, the Company is prepared to agree to a mutual separation where you would be paid your severance as well as days you were on unpaid suspension and two weeks pay in lieu of notice, less all statutory deductions as full and final settlement of any future claims totaling EC\$8027.74.

In the event you wish to accept the Company's offer, we will require that you review and sign to our standard Employment Release Form, a copy of which is enclosed and return same on or before Friday 28 September 2018."

17. The Employee did not accept the Employer's proposed mutual separation package by the stipulated date of September 28, 2018. As a result, by letter dated October 08, 2018 the Employer stated the chronology of events and terminated the employment relationship. Excerpts from that letter are as follows:

"Having rejected management's offer of a mutual separation and in light of management's view that your misconduct led to a total erosion of the trust and confidence that management should have in you as an employee and has clearly demonstrated that the employment relationship cannot reasonably be expected to continue, management is left with no option but to terminate the employment.

You are therefore advised that your employment with the company is terminated with immediate effect pursuant to the Collective Agreement as well as section C59 of the Labour Code of Antigua and Barbuda.

Please find enclosed a cheque in the sum of EC\$3681.62 reflecting payment for those days you were placed on suspension, 6, 7, 10-14 and 17-21 September as well as (8) hours/day for 24-28 September and 1-8 October; a total of 23 days; plus, two weeks' pay in lieu of notice, less (4) days for vacation taken but not earned and all applicable deductions.

Discussion

18. Firstly, in our discussion towards resolution of the issue of unfair suspension, we note that in its letter of termination dated October 8, 2018, the Employer virtually admitted that it was unfair to suspend the Employee as it did during the month of September. Further, the Employer paid the Employee his full days' pay for days he remained in limbo pending his acceptance or refusal of the Employer's mutual separation package.
19. Curiously, the Employer also paid the equivalent of two weeks' pay in lieu of notice less a deduction of 4 days' pay for vacation taken but not earned. In our opinion, suffice it to say, the evidence does not support that deduction and it should not have been made.
20. As to the issue of unfair dismissal, we find that notwithstanding its letter dated September 25, 2018 by which it offered the mutual separation package, the dismissal was effected by the letter dated October 8, 2018. The contents of that letter reveals that the Employer's main reason for the dismissal was the "misconduct" of the Employee which led to a "total erosion of the trust and confidence".
21. As to the precise reason for the dismissal, we note Mr. Carty's submission that the termination letter does not state a precise reason for the dismissal, as required under Section C10 of the Labour Code. In our opinion, there were more than one reasons, which, although not stated concisely could have had the cumulative effect of eroding the Employer's trust and confidence in the Employee. Thus, for present purposes, the Employer had potentially good factual bases for the dismissal.
22. In his closing submissions Mr. Carty also highlighted the absence of Mr. Steele as witness at the trial. We agree with the submission that without Mr. Steele's direct testimony the balance of probability would favour the Employee. Based on the evidence before us, the Employer failed to properly discharge its evidentiary burden of establishing a significant part of its factual bases for the precise reasons for the dismissal.
23. As to the summary dismissal of the Employee, in our view, the same was not warranted in the circumstances: The Employer's handling of the several incidents and its ultimate offer of a separation package giving the Employee several days to consider accepting it, obviously militates against justification for a subsequent summary dismissal. In any event, by its payment of 2 weeks' wages in lieu of notice, the Employer appears to have conceded that it could not justify summary dismissal under the circumstances.

24. In any event, we find that, in the absence of testimony from Mr. Prince and Mr. Steele, the Employer failed to discharge its burden of presenting the required cogent, weighty and convincing evidence at the trial to prove that it had good reasons for the dismissal and that it acted reasonably. Because of that failure, we are inclined to find that the dismissal was unfair.
25. In cases such as this, where the Employer treats with the Employee over an extended period of time in respect of several alleged acts of misconduct the application of the mandatory test of reasonableness, pursuant to Section C 58(2) of the Labour Code, tends to overshadow the requirement for proof of precise reason for the dismissal. In our estimation, the Employer's actions were so manifestly unreasonable that they tended to supplant the prerequisite precise reason.
26. On careful consideration of the evidence we find that the Employer acted unreasonably in dismissing the Employee under the then prevailing circumstances. It will suffice to highlight the following elements of unreasonableness:
- (a) When the Employee requested permission to take a day off from his supervisor, it was unreasonable for him to request that the employee himself should speak to the Manager. In the circumstances, it was not unreasonable for the Employee to form the opinion that his supervisor had in fact granted the requested permission.
 - (b) The initial suspension of the Employee without pay was unreasonable. In the circumstances, it was not unreasonable for the Employee to conclude that he was being punished unfairly.
 - (c) The Employer's refusal to assist the Employee by either allowing him to access a portion of his thrift fund entitlement or granting him an advance on his wages. The Employer was unreasonable in the circumstances. The facts suggest that the Employer could have been more compassionate.
 - (d) The investigative process adopted by the Employer was unreasonable in that it did not involve or sufficiently involve the Employee's participation. In any event, the Employer's findings at the several stages of the investigation were not put to the Employee sufficiently or at all. And he was not given any or any sufficient opportunity to respond to the findings.
 - (e) The extension of the initial suspension without pay was unreasonable in the circumstances.

- (f) The Employer's response or lack thereof to Mr. Nicholas's conclusion on which it relied - including those that the Employee had been using mind altering substances and was unstable and had threatened members of its management team - was unreasonable. A more compassionate and caring response would have been more appropriate.
- (g) There is no evidence that the Employer notified or consulted with the Employee's bargaining agent, the Antigua and Barbuda Workers' Union, with which it had a collective agreement for the category of workers which included the Employee. That omission was unreasonable.
- (h) At the point where the Employer decided to consider the proposed mutual separations package, it failed to consult or adequately consult with the Employee and his Union in respect of the contents of the package. Thus, it appears that the Employee and his Union were unreasonably deprived of the opportunity to make an input towards the proposed agreement.
- (i) When the actual offer of the mutual separation package was offered to the Employee, he was given only 3 days to respond. Given the obvious need for the Employee to consult with his Union or otherwise get appropriate advice, it was unreasonable for the Employer to limit the time for his response to only 3 days.
- (j) It was unreasonable to require the Employee to sign the release, given its extent and intended effect.
- (k) In light of the interventions of the Employee's representative in an effort to negotiate an acceptable package, the Employers failure or refusal to engage in negotiations was unreasonable in the circumstances.
- (l) It was unreasonable to summarily dismiss the Employee in the circumstances, without any further consultation, discussion or negotiation. There were no further acts of misconduct or any other supervening event to justify the Employer's action.
- (m) In the circumstances, the terms of the dismissal letter were unfortunate in that the Employer appeared to concede that it had taken some missteps adverse to the Employee.

27. Ultimately, since the Employer failed the statutory test of reasonableness, the dismissal was unfair.

Compensation

28. We award compensation payable to the Employee as follows.

Notice Pay

We award the sum of **\$1,464.00**, being the equivalent of 2 weeks' pay.

Loss of Protection

We award the sum of **\$4,977.60**, being the equivalent of one day's pay for each month of employment: ($\$146.40 \times 34$).

Immediate Loss

We award the sum of **\$12,688.00**, being the equivalent of 4 months' wages.

Fringe Benefits

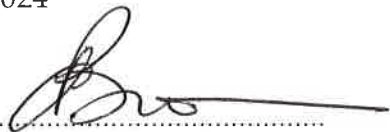
We award the sum of **\$12,000.00** being the equivalent of the Employee's share of the service charge fund calculated at the rate of \$3,000.00 per month for 4 months.

Order

29. In the premises, we order that:

1. The Employer do pay the total sum of **\$31,129.60** to the Employee as compensation for his unfair dismissal, no later than March 15, 2024.
2. The Employer do ascertain the outstanding balance of the Employee's portion of the Thrift Fund, if any, and immediately pay the same to the Employee.

Dated this 15th day of February 2024


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Charlesworth O. D. Brown
President


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John R. Benjamin
Member
