

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/31 of 2020

BETWEEN:

GISEL WATTLE - JOSHUA

Employee

And

ANTIGUA TRADES AND LABOUR UNION

Employer

Before:

The Hon. Samantha May- Francis

The Hon. Ms. Judith Dublin

The Hon. Mr. Dalma A. McCoy

Vice President

Member

Member

Appearances:

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

Mr. Jonathan Marshall of Marshall and Company, Attorneys-at-Law for the Employer

2023: September 28

2024: March 28

Employee instructed by Employer to apologise to Security Firm- Employee refused- Employer suspended Employee without pay- was the Employee's suspension unfair; Employer dismissed the Employee for insubordination for failing to apologise - was there a factual basis for the dismissal of the Employee- did the Employer act reasonably or unreasonably when it dismissed the Employee for failing to issue an apology; Is the Employee entitled to compensation.

JUDGMENT

May -Francis, VP

Background

1. By her Reference filed on June 8, 2020, commencing these proceedings, the Employee identified unfair suspension and dismissal as the main issues.
2. The Employer is an established trade union in Antigua and Barbuda that represents non-established Government and private sector employees.
3. The Employee commenced employment as an Industrial Relations Officer on November 7, 2016. Her duties were, inter alia, to provide proper guidance at all times to workers in respect of employment issues, to provide proper representation to workers at all times, negotiate Collective Bargaining Agreements in respect of any of the Antigua Trades & Labour Union's Bargaining Units; perform duties in an honest, respectful and professional manner, perform tasks without fear, favour or any form of prejudice or discrimination; decides in the interest of the development of the Social and Economic condition of the workers and especially to those who are considered to be in lower and middle class.
4. The Employee was paid a gross monthly salary of \$3,230.37 plus a duty allowance of \$300.00 and a travelling allowance of \$650.00, respectively.
5. On May 7, 2019, the Employee and the then General Secretary, Mr. Hugh Joseph of the Employer, attended a meeting at the Labour Department to address matters concerning a complaint of 'unfair labour practices' made against a security firm whose employees the Employer represented as Bargaining Agent. During the meeting, the Employee stated that a cheque issued by the Security Firm for payment of its employees' union dues had 'bounced'. The Director present took great offence to the statement made by the Employee and immediately demanded an apology.
6. According to the witnesses, the statement that the cheque had bounced brought the conciliatory meeting to a halt. Mr. Hugh Joseph, after making inquiries, confirmed that the cheque had been returned because a wrong date had been placed on it, which caused it to be stale-dated. The cheque was dated February 28, 2018, but was stamped on March 5, 2019, presumably when it was submitted for negotiation to the Bank.
7. The Security Firm's request for an apology was restated in a letter dated May 15, 2018, to the Employer. In its letter, the Firm states that it considered the Employee's statement irresponsible and created a false image of the company. Further, the statement could lead to severe reputational damage to its business. Having received the letter, the Employer instructed the Employee to issue a written apology to the

Security Firm's Managing Director. On May 20, 2019, the Employer demanded that the Employee write a letter of apology to the Director of the Security Firm within seventy-two (72) hours or be subject to disciplinary action.

8. The Employee refused to issue an apology, and on July 10, 2019, after returning to work, having been on certified sick leave, the Employer, by letter dated July 10, 2019, suspended the Employee from July 10 to July 16, 2019. In the suspension letter, the Employer demanded that the Employee provide the apology she was previously instructed to issue at the end of her suspension upon return to work. Additionally, the suspension letter stated that should the Employee fail to comply with the Employer's instruction, she would be subject to further disciplinary action.
9. The Employee, upon her return to work on July 17, 2019, maintained her position and did not provide the Employer with a written apology. On July 19, 2019, by letter dated May 19, 2019, the Employer dismissed the Employee.

The Legal Framework

10. It is clear that in accordance with section C 58 (1) of the Antigua and Barbuda Labour Code, the Employer relies on misconduct as good cause for the Employee's dismissal. The proviso in that section is that there must be a factual basis for that assigned reason. Section C 58 (1) provides:

"C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor (a) relates to the misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

(a);

(b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do within the limitations of section C59 (2);

(c) is that the employee was made redundant;

(d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or

(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

Provided, however, that there is a factual basis for the assigned reason."

11. Section C59 (1) allows for the summary dismissal of an employee who is guilty of serious misconduct such that the employer could not reasonably be expected to continue the employment relationship. Section C 59 (1) provides:

"C59 (1) An employer may terminate an employee's employment where the employee has been guilty of misconduct in or relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to, situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer; or

(c) behaved immorally in the course of his duties."

12. An employer's action in dismissing an employee is always subject to the test of reasonableness under section C 58 (2) of the Labour Code. The question is whether the employer acted reasonably or unreasonably in dismissing the employee for the assigned reason under the circumstances that prevailed at the material time.

13. Section C 58 (2) reads:

"C 58 (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal."

14. Where an employer has dismissed an employee, the burden is on the employer to prove, on a balance of probabilities, that the dismissal was not unfair.

Resolving the Dispute

15. The main issues are whether the employee was unfairly suspended or unfairly dismissed, which must be resolved in accordance with the provisions of the Labour Code and the evidence before the Court. To that end, the first question to be answered is whether there was a good factual basis for the Employer's conclusion that the Employee was guilty of misconduct. Secondly, the Court must consider whether the Employer presented sufficient evidence with sufficient weight. Thirdly,

the Court must also consider whether the Employer acted reasonably in dismissing the Employee for the assigned reason of misconduct in the circumstances.

16. The dismissal letter reads:

"Dear Ms. Joshua,

Please recall that you initially received formally instruction to provide a written apology to the Management of Square Dear Security Plus, via letter dated 20th May, 2019. However due to illness you were out of office on extended sick leave commencing the following day 21st May, returning to office on 8th July. On 10th July, an inquiry was made of you, in the presence of your attorney concerning the instructions of 20th May. Your request revealed that you had not prepared the apology as requested; consequently, you were suspended for five working days starting from 10th to 16th July for your continued insubordination and further warned that failure to comply would result in further disciplinary action, including termination.

On Wednesday 17 July 2019 you returned to work without a copy of the written apology as the suspension letter required, thereby continuing the insubordinate behaviour. Therefore, in keeping with letter dated 10th July 2019, and the instructions of the Executive, which was reiterated at a meeting of Wednesday 17th July, I hereby advise that your employment with the Antigua Trades and Labour Union is hereby terminated with immediate effect.

You are to return all property in your possession which belongs to the Union, including Uniforms, further to which payment for the period worked during this month, along with outstanding vacation, will follow in accordance with regular payment intervals..."

17. Mr. Carty, the Employee's Representative, argued that the Employer and the Security Firm were engaged in conciliation before the Labour Commissioner as permitted by the Antigua and Barbuda Labour Code. This meeting addressed a range of matters concerning the employees of the Security Firm. The Employee was present in her capacity of Industrial Relations Officer on behalf of the employees within the Bargaining Unit. Further, in her judgment, she thought she possessed the 'privilege' to bring up the issue of outstanding union dues and the 'bounced' cheque. As the Industrial Relations Officer responsible for that Bargaining Unit, it was within her purview to address matters concerning union dues. Mr. Joseph, having clarified the circumstances around the return of the cheque, the Employee said nothing more on the matter and accepted Mr. Joseph's clarification of the issue.

19. Mr. Jonathan Marshall, Counsel for the Employer, did not share Mr. Carty's view and submitted that the Employee held a position of trust. The Employee was under a duty to protect information received in the course of her employment, and it was inappropriate for her to divulge the same without the authorisation of the Employer. Mr. Marshall further submitted that having discussed the issue of the cheque, the Employee breached confidentiality, and the Employer lost trust in her. Additionally, the information she divulged was incorrect, and after learning that it was incorrect, she refused to apologise. The Employer says this is tantamount to insubordination, and her dismissal was fair in accordance with the Labour Code.
20. The underlying conduct for which the apology was demanded and for which the Employer stated was inappropriate must be considered. Mr. Joseph, who gave evidence on behalf of the Employer, conceded that the Employee had done nothing wrong in bringing up the issue of non-payment of union dues. His evidence is simply that it was inappropriate for the Employee to have stated that the cheque had 'bounced'. We, however, note that in the correspondence to the Employee dated May 20, 2019, the suspension letter of July 10, 2019, and the dismissal letter dated May 19, 2019, at no point did the Employer state nor make it clear to the Employee prior to the suspension and dismissal that it had found or concluded that the statement made by the Employee was inappropriate or that she had engaged in any form of misconduct as the basis for the requests for the apology.
21. Rather, the first letter to the Employee, dated May 20, 2019, stated, **"On Wednesday 14th May 2019, you were apprised that a request was made by the Managing Director of Square Deal Security Plus, Mr. Alvin Jones, that you provide a written apology for the inaccuracy of the statement you made during the meeting of 7th instance with respect to the bounced cheque"**. Likewise, the subsequent letters did not reference the Employee's statement as inappropriate. We note that the initial letter from the Employer came two (2) weeks after the Employee had made the statement and only after the Director of the Security Firm wrote demanding an apology. Additionally, there was no evidence that the Employer's request for the apology was part of a disciplinary process commenced against the Employee in relation to the statement she made.
22. The refusal to apologize did not occur in a vacuum. Hence, the degree of seriousness of the misconduct that led to the suspension and then to the dismissal is critical to the ultimate assessment of the reasonableness of the Employer's response. Notably, the Employer's decision that the Employee ought to be suspended and subsequently dismissed was not as a result of her statement but after she refused to offer an apology without any finding or communication to the Employee that she had engaged in misconduct when she stated that the cheque had bounced.

22. The refusal to apologize did not occur in a vacuum. Hence, the degree of seriousness of the misconduct that led to the suspension and then to the dismissal is critical to the ultimate assessment of the reasonableness of the Employer's response. Notably, the Employer's decision that the Employee ought to be suspended and subsequently dismissed was not as a result of her statement but after she refused to offer an apology without any finding or communication to the Employee that she had engaged in misconduct when she stated that the cheque had bounced.
23. The burden rested on the Employer to demonstrate that the sanction imposed for misconduct, in this instance, insubordination, was reasonable – dismissal for misconduct is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the misconduct based on the overall circumstances of the case. Having considered the evidence and hearing the witnesses' testimonies, we find the following:
- (i) The Employee was a competent and trusted worker.
 - (ii) Apart from the returned cheque, the Employer presented no other issues concerning the Employee.
 - (iii) The employee was present at the Labour Department to discuss matters pertaining to the treatment of the employees in its Bargaining Unit employed by the Security Firm. The issue of non-payment of union dues in the context of the meeting was relevant.
 - (iv) It is accepted that a **"bounced cheque"** to some individuals means there are insufficient funds in one's bank account. However, many attribute a bounced cheque to a return cheque, no matter the reason.
 - (v) The Employer did not consider that the Employee committed any offence in raising the issue of the unpaid union dues.
 - (vi) After inquiry, Mr. Joseph clarified the circumstances surrounding the return of the cheque.
24. Regarding our findings of fact above, we believe that the situation was not as grave as the Employer attempted to portray at trial. After all, while at the conciliatory meeting, the issue was cleared by Mr. Joseph, the General Secretary, when he returned to the meeting, advising that the cheque had not 'bounced' because of insufficient funds but because there was an incorrect date. Any perception or conclusion that the Hearing Officer or any other person present may have formed concerning the Security Firm in the split moment was quickly dispelled and clarified by Mr. Joseph, who was also present as a representative of the Employer.
25. Additionally, on the issue of confidentiality and whether or not the Employee ought to have disclosed that the cheque had bounced, in our view, in the context and very

nature of conciliation is to encourage parties to participate fully in the issues, they are usually encouraged to speak on all matters relevant to settling the dispute between the parties and find an amicable solution.

26. It is appreciated that the Employer might have been threatened with a lawsuit. However, having received that threat and wishing to shield itself from legal action, the Employer provided no testimony of consultation with its Attorney to seek legal advice to determine the legal exposure or potential exposure to it before making the decision to dismiss the Employee. Without substituting our views for that of the Employer, perhaps had they consulted with their Attorney, they would have been advised that conciliatory hearings at common law are legally privileged.
27. Alternatively, a senior person within the organisation could have quelled the issue by issuing an apology on behalf of the Employer. We also note that there was no attempt by the Employer before suspending and/or dismissing the Employee to negotiate an acceptable form of apology having regard to the Employer's evidence that the Employer had not done anything wrong in raising the outstanding union dues. In any event, there is no evidence that the Employee's actions caused a loss of reputation or otherwise to the Security Firm or the Employer's reputation or placed them into dispute or at risk.
28. In the circumstances considering the factual basis for the dismissal, the test for reasonableness under Section C 58(2) of the Labour Code must be applied in the context of the overall situation. The dismissal came without any conclusion by the Employer that the Employee had engaged in misconduct when she made the statement that the cheque had bounced, which was the trigger for the request for an apology. Further, we note that the Employer had already suspended the Employee for the same alleged infraction of insubordination based on the same incident, which led to her dismissal. To this end, the Employer has failed to prove that it acted reasonably in suspending and dismissing the Employee for the reasons that it did based on the circumstances of this case. As such, the Employee is entitled to compensation.

Compensation

26. The Employee has been unfairly suspended and unfairly dismissed. Therefore, we considered the following heads of compensation:

(a) Loss wages:

Having found that the Employee was unfairly suspended, as provided by Section B3 of the Labour Code, she is entitled to compensation of 1 week's pay in the sum of \$745.47.

(b) Loss of Protection from Unfair Dismissal

The Employee worked for 2 years and 8 months from November 2016 until July 2019. The Employee was paid monthly. Accordingly, we award loss of protection equivalent to severance pay at one month per year for every year worked in the sum of **\$8,614.32** ($3,230.37 \times 2.66$).

(c) Notice Pay

We award the Employee **\$3,230.37**, which is one month's basic salary and allowances.

(d) Immediate Loss

This head is considered when an Employee who has been unfairly dismissed suffers a loss between the date of dismissal and the date of assessment of the loss, subject always to the employee's duty to mitigate. The Employer's evidence in Chief is that at the time of her dismissal, she was 62 years old. She gave evidence that after her dismissal, she was interviewed at several organisations, including a construction company, the Cancer Center, the Antigua and Barbuda Workers Union and The Antigua and Barbuda Free Trade Union. Her evidence is that though she interviewed due to the pandemic, she was not offered any positions. At the date of trial, she had already reached pensionable age as determined by the Board of Social Security. Though we can accept that the Employee's age could have negatively affected her prospects of employment, we are not convinced that the Employee was diligent enough to find a job. Based on her evidence, she applied to five establishments to find a job, which is, on average, one application in the four years since her dismissal. Regarding the award for notice pay, we award three (3) months' wages in the sum of **\$9,691.11** ($\$3,230.37 \times 3$).

Order

27. In the premises, we order that:

- i. The Employer shall pay compensation to the Employee for unfair dismissal in the aggregate sum of **\$22,281.27** comprised as follows:

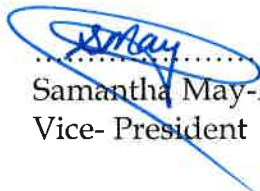
(a) Loss wages for one week	\$ 745.47
(b) Loss of Protection from Unfair Dismissal	\$ 8,614.32
(c) Notice Pay	\$ 3,230.37

(d) Immediate Loss of
TOTAL

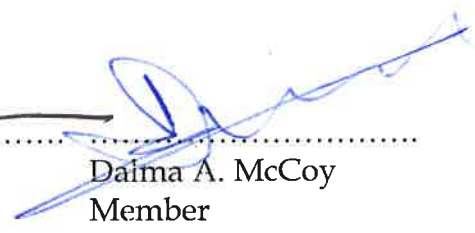
\$ 9,691.11
\$ 22,281.27

- ii. The Employer shall pay the aggregate sum of **\$22,281.27** on or before May 1, 2024.

Dated this the 28th day of March, 2024


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Samantha May-Francis
Vice- President


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Judith Dublin
Member


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Daima A. McCoy
Member