

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 42 of 2019

BETWEEN:

DAVINA MARTIN

Employee

and

CHASE DISTRIBUTORS LTD

Employer

Before:

The Hon. Samantha May- Francis

Vice President

The Hon. Hesketh A. Williams

Member

The Hon. Collin R. Maynard

Member

Appearances:

Mr. Samuel James and Simon Leonard of Antigua & Barbuda Free Trade Union
Representative for the Employee

Dr. David Dorsett of Watt, Dorsett & Hewlett Law, Attorney-at-Law for the Employer

2023: October 9
December 15

Suspension- was the Employee unfairly suspended? Dismissal- did the Employer constructively and unfairly dismiss the Employee? Section C 58 (2) of the Labour Code- the "reasonableness test"; Compensation- is the Employee entitled to compensation?

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JUDGMENT

The Claim

1. The Employee, by Reference No. 42 of 2019, filed on September 3, 2019, claims that the Employer constructively and unfairly dismissed her. The Employee sets out her claim in the Employee's Memorandum filed on September 3, 2019.

Background

2. The Employer ranks high in popularity as one of Antigua's leading wholesalers and supermarkets.
3. The Employee began working as a Cashier with the Employer in March 2013. All was going well until January 16, 2019, when the Employer observed by video surveillance



a cashier handing money to the Employee, who subsequently placed the money in her pocket. The employee who gave the money to her was subject to investigation for suspected theft against the Employer. The Employer notified the Police of what it saw and its suspicion that the Employee was engaged in theft.

4. On February 1, 2019, three police officers from the Criminal Investigation Department attended the workplace and took the Employee into custody. A search warrant was issued to Employee, and her home and person were searched. The Employee was also taken into custody and held in a cell at the St. John's Police Station, where she remained for one day. Upon her release, she was instructed to return to the Criminal Investigation Department for questioning on February 3, 2019. She complied and was subsequently released without charge.
5. On February 4, 2019, the Employee returned to work. Upon her return, she was asked to write a report and issued a suspension letter. The suspension letter dated February 4, 2019 reads:

"Dear Mrs. Martin,

This letter is to advise you that you have been placed on suspension for 30 days, commencing Monday, February 04, 2019, to Monday, March 04, 2019, without pay. This is to facilitate further investigation into the Company taped footage which showed you accepting money from cashier Jahnelle Jackson on Wednesday, 16 January 2019 and placing it into your pocket.

..."

6. The Employer proceeded on investigative suspension. There was no communication or contact between the Employer and the Employee until March 5, 2019, when the Employee's Representative issued to the Employer a correspondence which stated that, based on the matters which transpired, the Employer no longer had trust and confidence in the Employee and that she too no longer had trust and confidence in the Employer. Accordingly, she claimed constructive dismissal.

The Employee's case

7. In her Memorandum filed on September 3, 2019, the Employee contends:
 - (i) She did take money (the float) from the cashier on January 16, 2019 and placed it in her pocket. However, she did so for safekeeping. She subsequently took her other float and the float given to her by the Employee to the Accounts Department at the end of the shift.
 - (ii) She had no inclination that the Employer had suspected her of theft or that she was being investigated for theft until February 2, 2019, when the Police attended the workplace and arrested her.

- (iii) Before the Employer involved the Police, the Employer gave her no opportunity to address the concerns the Employer had. The Employer intended to embarrass her.
 - (iv) Upon her return to work on February 4, 2019, the Employer requested that she provide a written report of the January 16, 2019 incident. Immediately after making the request, the Employer suspended her without pay pending further investigation.
 - (v) Additionally, the length of the suspension exceeded the statutory limit as provided by Section B 3 of the Antigua and Barbuda Labour Code, and she was constructively dismissed effectually.
 - (vi) The Employer failed to conduct any proper investigation. During the suspension period, the Employer made no inquiries of her and has never produced a finding of their investigations.
 - (vii) She believed by then the Employer had lost trust and confidence in her, and she too had lost trust and confidence in the Employer.
8. In its Memorandum filed on July 30, 2020, the Employer's defence was that:
- (i) The Employee was seen on video footage placing money belonging to the Employer in her pocket. The reason for so doing is peculiar to the Employee.
 - (ii) It was not the policy for employees to place the float in their pockets for safekeeping.
 - (iii) The report made to the Police was about theft or suspicion of the theft of employees, the Employee included. It had no control over how the Police chose to conduct its investigation.
 - (iv) Following the Employee's arrest and upon her return to her work, it was justified to suspend the Employee for further investigation.
 - (v) Despite its error in calculating the suspension period, which resulted in the suspension exceeding the statutory limit, the Employer had not arrived at any conclusion to dismiss the Employee as their investigation had not been concluded.

The Main Issues

9. Having regard to the Memoranda, the main issues arising are:
- (i) Was the Employee unfairly suspended?
 - (ii) Did the Employer constructively and unfairly dismiss the Employee?
 - (iii) If the Employee was constructively and unfairly dismissed, whether she is entitled to compensation?

Resolving the Issue

Unfair Suspension:

10. The resolution of this issue will be determined within the parameters of the provisions of Sections B3, C58, and C59 of the Antigua & Barbuda Labour Code (the Labour Code), which read as follows:

“B3”suspension” means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee’s alleged misconduct.”

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); (b) ... (c) ... (d) ... Provided, however, that there is a factual basis for the assigned reason. 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.

C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in 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 demonstrate that the employment relationship cannot reasonably be expected to continue; (b) ... (c) ... (d) C59 (2) Where an employee is guilty of misconduct in or about his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of (a) a repetition of the misconduct; or (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

C59 (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.”

11. In Reference No. 56 of 2016 *Otis Teague v Antigua & Barbuda Utilities Authority*, this Court examined the statutory provisions regarding suspensions. It concluded that although there are no express provisions dealing with investigatory suspensions, it is clear that they may be effected under section C 59 (3), provided

that the period of suspension does not exceed the four-week limit established by the definition of suspension under section B3.

12. On February 4, 2019, when the Employer suspended the Employee, it is noteworthy that the Employer had suspected the Employee of theft since January 16, 2019. However, the Employer permitted the Employee to continue to carry out her duties as Supervisor to the cashiers until February 1, 2019. Likewise, between January 16 and February 1, 2019, the Employee had no discussions with the Employer concerning the video footage or its suspicion. The Employee was not aware of the Employer's suspicion or the fact she was being investigated until February 1, 2019, when the Police showed up at the workplace and arrested her. The Police searched her home, interviewed and released her. She returned to work and was only then asked to write a report. Additionally, based on the evidence it is unclear whether the Employee produced her written report as requested by the Employer before her suspension on February 4, 2019.
13. Another factor considered is that the Employer imposed an investigative suspension without pay, even though it had not yet concluded its investigation. This Court, in **Otis Teague v Antigua Public Utilities Authority Reference 56 of 2016**, in its interpretation of Section B3, 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 based on punitive or investigative motives. Each of the two categories may be either 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. The definition concisely identifies the four types seamlessly and states a single maximum period of 4 week.**
14. There was no indication in the suspension letter that the Employee would be paid wages if the investigation cleared her. Notably, the ‘Employee Reference Manual’ appears only to address the situation where an Employee is placed on paid investigative suspension and subsequently found guilty of gross misconduct that the Employer “reserves the right to make the necessary adjustments regarding employment payment as is necessary.”
15. In any event, the suspension did not conform with the provisions of sections B3 of the Labour Code nor with the provisions related to investigative suspension as

stipulated in the 'Employee Reference Manual'. It started on February 4, 2019 and ended on March 4, 2019 – a fact which the Employer has accepted.

16. In the final analysis, we are not convinced that the suspension was reasonable and effected for the Employer to conduct the desired proper investigation.

Constructive Dismissal:

17. This is not the first time that this Court has had to consider the doctrine of constructive dismissal where an employer did not expressly dismiss an employee, and the employee alleges that the employer is guilty of a repudiatory breach of the contract of employment, which goes to the root of and destroys the employer/employee relationship. In this Reference, the Employee contends that the Employer, by its conduct, seriously offended the implied term of mutual trust and confidence which ought to exist between them as Employer and Employee.
18. It has already been established by the many decisions arising from this Court that a constructive dismissal could be deemed an unfair dismissal where the Employer acted unreasonably in breaching the implied term of trust and confidence. One such decision is **Wayne Weaver v St. James Club** and **Reference Reference No. 35 of 2012**, where this Court applied the landmark judgment in **Western Excavating (ECC) Ltd. v. Sharp [1978] 1 All ER 713**. Without repeating the quotation of the dicta of Lord Denning in the Western Excavating case, it will suffice to say that constructive dismissal originates from the conduct of the employer, which goes to the root of the contract of employment and entitles the employee to treat himself as being wholly discharged from any further performance under it. Thus, a claim of constructive dismissal is not the express statutory provisions of the Labour Code but rather the applicable fundamental principles of common law.
19. Learned Representative Mr. James argued that the facts support a finding that the Employer no longer possessed trust and confidence in the Employee. Likewise, the Employee, based on the actions of the Employer, had lost trust and confidence in the Employer, which entitled her to walk away and claim constructive and unfair dismissal.
20. He argued that the Employee was a Supervisor with an exemplary employment record. The Employer had not lost any money by the actions of the Employee yet the Employer reported the matter to the police instead of informing the Employee of its suspicions. With great enthusiasm, he submitted that the Employer could have averted the Police from attending the workplace to take the Employee into custody but did not do anything to prevent this, as the Employer intended to cause the Employee embarrassment. Mr. James argued that this embarrassment was further

compounded when the Employee returned to work only to be placed on investigative suspension without pay for thirty (30) days.

21. Learned Counsel, Dr. David Dorsett, counter-argued that the Employee reasonably informed the police of its suspicion of theft. He argued who better to tell than the Police. He submitted that the Employer had no control over how the police conducted their investigation. Learned Counsel Dr. Dorsett submitted that the Employee acted too “hastily and opportunistically” instead of correcting the Employer. He contended that the Employee did not bring the error to the Employer’s attention and that it had suspended her beyond the four weeks stipulated by the Labour Code. He argued the Employee instead waited for the expiration of the suspension to claim constructive dismissal. Learned Counsel’s submissions suggested that the Employee’s primary basis for advancing a claim for constructive dismissal is the Employer’s breach of Section B3 by exceeding the statutory limit.
22. However, by Order dated August 27, 2020, the Court already declared that the February 4, 2019, suspension letter did not amount to a constructive dismissal of the Employee. Accordingly, the Employer’s Application, dated July 30, 2020, for Summary Judgment was denied.
23. We, therefore, considered the particulars of the Memoranda and the related conduct of the parties as disclosed in the oral and documentary evidence, particularly the letter of March 5, 2019, written to the Employer by Learned Representative Mr. James on behalf of the Employee. We note the following:
 - (i) The Employer suspected the Employee of the theft since January 16, 2019. However, the Employee continued her duties supervising the cashiers until February 1, 2019.
 - (ii) Between January 16 and February 1, 2019, the Employee had no discussions with the Employer concerning the video footage or its suspicion, nor did the Employer advise that she was under investigation by the Employer for theft or suspicion of theft arising out of the incident on January 16, 2019.
 - (iii) The Employee was not aware of the Employer’s suspicion or the fact she was being investigated until February 1, 2019, when the Police showed up at the workplace and arrested her.
 - (iv) The Employee returned to work on February 4, 2019, after her home was searched; she was taken into police custody, interviewed by the Police and released without charge.
 - (v) Upon arrival, she was asked to report what had transpired on January 16, 2019. She was also issued a suspension letter of even date suspending for investigation for thirty (30) days without pay.

- (vi) She remained on investigative suspension, and during the suspension period up to March 4, 2019, her last day of suspension, the Employer never contacted her as part of the investigation.
 - (vii) The Employer did not produce a report describing its investigation findings.
24. While we accept that the Employer was within its right to report its suspicion to the police, we are of the view that considering the position held by the Employee and her otherwise good track record, perhaps she ought to have benefited from a more clandestine encounter with the police while at the workplace. In our minds the manner in which the events transpired was sufficient to leave anyone in such situation embarrassed. Therefore the Employee's feeling of embarrassment was rationale in the circumstances and appreciate that this may contributed to the loss of trust and confidence in the Employer.
25. Equally, the Employer acted unreasonably in failing to advise the Employee for approximately two weeks after the incident that it was investigating theft or suspicion of theft against her. It is noteworthy our emphasis here is not on the police investigation but instead on the investigation conducted by the Employer. Again, we accept the Employee's evidence that this also caused her to lose trust and confidence in the Employer.
26. Additionally, the evidence did not reveal that the Employer even permitted the Employee the opportunity to produce the written report it requested on February 4, 2019, or that it carried out any investigation of its own. We note that the Employee's evidence is that she was waiting for the Employer to contact her during the suspension period. The investigative suspension ended without any word from the Employer. This, she states, caused her to lose further trust and confidence in the Employer and ultimately led to her instructing Mr. James to issue the letter of March 5, 2019, claiming constructive dismissal.
27. The Employer did not respond to the Employee's letter of March 5, 2019, in which the Employee invited the Employer to resolve her claim that she had been constructively dismissed. The letter of March 5, 2019, clearly outlines the reasons why the Employee felt that she could no longer trust the Employer. Of equal importance is the fact despite having considered that the Employer had constructively dismissed her, the Employee extended an invitation for an amicable resolution, creating an opportunity, if there was any doubt, for the Employer to set the record straight and to emphatically state that it had not repudiated the employment contract and that its trust and confidence in the Employee remained intact. The Employer never responded or otherwise attempted to resolve this issue.
28. In our view, the invitation to amicably resolve the issue dispels any allegation that the Employee sat and waited for the expiration of the suspension to 'hastily and

opportunistically' claim constructive and unfair dismissal and perhaps further bolsters the Employee's claim.

29. In determining the issue of constructive dismissal, we reminded ourselves that it is an objective test that must be applied in deciding whether the Employer's breach was sufficiently important to justify the Employee resigning or considering herself as being constructively dismissed. Put another way, we asked, "Did the Employer's conduct, when viewed objectively, have such an impact on the Employee, that the Employee could properly conclude that the Employer had repudiated her employment?"
30. Having regard to the principles laid down in **the Western Excavation** case and applied by this Court in the **Weaver** case, we are satisfied that the Employee met the requirements of the four limbs stated in the aforementioned cases; she having communicated to the Employer what she considered to be its repudiatory breach of the terms of her employment, she communicated her acceptance of the breach, she left the employment as a result of that breach, and she acted promptly. We also carefully considered the witness's testimony and documentary evidence and answered our previous question in the affirmative. We therefore find that the Employee was constructively dismissed.

Whether the Employee was unfairly dismissed:

31. We note that a constructive dismissal is not necessarily an unfair dismissal. Therefore, the Employee, having been constructively dismissed, we, were obliged to consider all the circumstances and the facts as we understand them and the statutory test of reasonableness under section C 58 (2) of the Labour Code. The Employee's claim for constructive dismissal came after the conclusion of a lengthy suspension. Yet there was no evidence of an investigation having been carried out by the Employer.
32. In answering the question did the Employer act reasonably or unreasonably in the circumstances, we paid particular attention to Mr. Chase's evidence. It is apparent from his evidence that great reliance was placed on the police investigation. Yet, the Employer seemed to have ignored the fact that Police, after having arrested, searched the Employee's home, interviewed her and released her without charge. The Employer also failed to give consideration to the fact it had not suffered any financial loss arising out of this incident or any other incident involving the Employee.
33. Mr. Chase's evidence is that the Employer found the Employee's actions to have been suspicious. We clearly appreciate and understand Mr. Chase's reasons for having formed that suspicion. Notwithstanding, we are of the view, that, it would have been reasonable for the Employer to immediately communicate to the Employee its suspicion. Thereafter, the Employee should have had the opportunity to respond,

defend and possibly exculpate herself. The Employer could have reasonably done so even after the intervention of the Police and while the Employee was on suspension.

34. In the final analysis, it became clear that notwithstanding, the initial existence of a potentially good reason to have suspected the Employer of theft, having heard Mr. Chase's testimony and relying on the documentary evidence filed in this matter, the Employer did not present the required cogent and weighty evidence to convince us that its actions which followed were reasonable. Additionally, we believe that the Employer's handling of the entire situation was unfortunately due to the Employer's conclusion that the Employee had engaged in "unethical behaviour" as stated in the suspension letter. Therefore, having applied the test of reasonableness, although the suspension on its own did not give rise to a dismissal, having heard all the evidence, from our analysis of the facts and evidence, we are of the view that the Employer acted unreasonably. To this end, we find that the Employer unfairly dismissed the Employee.

Compensation:

35. Therefore, we award compensation as follows:

(a) Loss of Protection from Unfair Dismissal

This is similar to severance pay. C 41 of the Labour Code recommends severance pay at the employee's latest basic wage for each day or a major fraction of his term of employment with his employer. This Court, based on the facts and circumstances of the case, has awarded compensation for loss of protection to fortnightly paid workers using a monthly rate. The Employee held a supervisory position with an unblemished record and had worked for approximately six (6) years from March 2013 to March 4, 2019. At the date of her dismissal, she was earning \$648.00 per week and worked 6 days per week. Her daily monthly wage was \$2808.00. Accordingly, we award loss of protection equivalent to severance pay at **\$16,848.00** (\$2808.00 x 6 months).

(b) Notice Pay

The Employee is entitled to one week's pay in lieu of notice. This is equivalent to **\$648.00**.

(c) Immediate Loss

The Employee gave evidence of her efforts to find employment at various supermarkets. She said she applied for jobs online and sent applications to about six hotels. She eventually found work at First Choice Supermarket on March 22, 2023, as a Cashier. She earns \$553.00 weekly. She did not receive any calls from

other supermarkets or the hotels she applied to. The Employee's evidence is that she continuously searched for employment. The Employee was not tested on her evidence on mitigation. In the circumstances, we have decided that an award of 4 months' wages under this head is reasonable. Therefore, the amount due is **\$11,232.00** (\$2,808 x 4).

(d) Outstanding Wages

As previously indicated, the Employee was unfairly suspended and as such is entitled to be compensated her wages in the sum of **\$2,592.00**.

36. In the premises, we order that:

- (i) The Employer shall pay compensation to the employee for her constructive and unfair dismissal of the Employee in the aggregate sum of **\$31,320.00** **comprised** as follows:

(a) Loss of Protection	\$16,848.00
(b) Notice Pay	\$ 648.00
(c) Immediate Loss	\$11,232.00
(d) Outstanding Wages	\$ 2,592.00

TOTAL	\$31,320.00
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- (ii) The Employer shall pay the sum of **\$31,320.00** on or before December 31, 2023.

Dated this ^{15th} day of December 2023


Samantha May Francis
Vice- President


Hesketh A. Williams
Member


Collin R. Maynard
Member