

ADVANCE VERSION OF JUDGMENT PENDING SIGNATURE
OF MEMBER

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ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/58 of 2015

BETWEEN:

FITZMORE BURNS

Employee

And

AMERICAN UNIVERSITY OF ANTIGUA COLLEGE OF MEDICINE

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence DeFreitas

Member

The Hon. Megan Samuel-Fields

Member

Appearances:

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

Dr. L. Errol Cort of Cort & Cort, Attorneys-at-Law for the Employer

2017: June 15, November 07

2024: February 15

Human Resources Manager, under direct supervision of Vice President, with duties affecting 129 workers - Employee withdrawing application for vacation leave and submitting a new one for leave to commence 2 days earlier - Employer repeatedly expressing concerns and issuing warning letter regarding Employee's poor performance - Application for leave not approved - Employee not responding to Vice President's request for a meeting - Employee issuing circular notifying Vice President and all staff of his impending absence on vacation leave- Employee proceeding on leave without requisite approval and failing to attend requested meeting - Whether Employee guilty of gross misconduct resulting in loss of trust and confidence sufficient to justify summary dismissal.

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JUDGMENT

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Background Matrix and Chronology

1. The Employer was established in or about 2004. It is a well-known institution providing tertiary level education in several categories of medicine to local and international students from its campus situate at University Park, Coolidge, Antigua.

2. At all material times, the Employer had a complement of 129 workers. Its President was at the apex of its Administrative Organizational Structure. He had the direct supervision of and control over Mr. Vernon Solomon, the Vice President of Administrative Services and Community affairs, who in turn exercised supervision and control over Mr. Martin La Barrie, Director of Administrative Services as well as the Employee, the Human Resources Manager. Both Mr. La Barrie and the Employee together with at least 4 other officers were at the same level, one tier below Mr. Solomon. There were no other officers at Mr. Solomon's level.
3. Under his contract of employment dated January 30, 2012, the Employee was required to report to Mr. Solomon and Mr. La Barrie. His responsibilities and duties required him to:

"

 - *Plan, organize, direct, control and coordinate the overall personal activities, training and labour relations activities of the organization.*
 - *Administer compensation, benefits and performance management systems, and safety and recreation programs.*
 - *Identify staff vacancies and recruit, interview and select applicants.*
 - *Allocate human resources, ensuring appropriate matches between personnel.*
 - *Preparing an employee handbook/disciplinary action manual in accordance with the labour Code and other labour standards.*
 - *Assess the Companies training needs and outsourcing/conduct the necessary training in the area of need."*
4. Under Clause 3 of the contract the Employee was paid a monthly salary of \$7,500.00 and a monthly Travel Allowance of \$1,000.00 at the commencement of his employment. He was entitled to annual vacation of 12 working days, the timing of which was subject to mutual agreement between the parties.
5. At the meeting of the Employer's managers on May 08, 2015, the Employer was critical of the performance of the Employee and his Department. In the minutes of the meeting, it was noted that suggestions were made by managers for the establishment of professional standards; improvement of accuracy, attention to detail and timelines; greater vigilance in staff matters; and the need for strong leadership in the Department.
6. By an application made May 08, 2015, the Employee applied for vacation for the period 10th to 19th June 2015. The application was endorsed by Mr. LaBarrie in the left margin but not by Mr. Solomon. The space providing for the signature of approval of the Department Head was left blank.

7. By email dated May 11, 2015, the Employee wrote to the Employer requesting financial assistance to facilitate his trip to London to defend his doctoral thesis on June 18, 2015
8. As at May 11, 2015, there were several outstanding matters which the Employee was required to complete within a specific time frame. On that date, Mr. Solomon sent an email to him listing the following 6 matters and enquiring as to when they would be completed: Employee handbook, Health and Safety policy; Disaster policy; Training agenda; HRM Software and Employee Appraisal Policy.
9. On May 16, 2015, four emails passed between the Employee and Mr. Solomon. Mr. Solomon stated that the Employer was "seriously concerned" about the Employee's "inability to meet set deadlines". Further, Mr. Solomon stated that the Employee had "not successfully met the demands and requirements of the Human Resources Department". In addition, Mr. Solomon stated the Employer's position that "the perception is that you are not to be trusted, even as stated by the union representatives, and that you are inefficient". Mr. Solomon closed that message by stating:

"The issues stated above can no longer be tolerated nor accepted. It is envisaged that you will make sufficient changes with immediate effect. If you need assistance please do not hesitate to ask. Please be reminded that this is not the first time I have stated this to you."
10. In his response on the same date, the Employee joined issue with the Employer on the allegations made against him. In particular, the Employee took "strong umbrage" to the Employer's indication that he cannot be trusted and asserted that those who believed that to be the case were "dead wrong".
11. By return email of the same date, the Employer explained that the trust which it mentioned in the earlier message "has to do with your getting things done, and your not following through on matters." The Employer also made it clear that no one was implying that the Employee was dishonest. Moreover, the Employer challenged the Employee to "be more accurate and efficient in the work" that he produced. Finally, in that response, the Employer pledged its support for the Employee and his department and stated that it expected "immediate results" from him.
12. By email dated May 22, 2015, Mr. Solomon criticized the Employee for not giving priority to certain matters with specific deadlines. The Employer asked about several matters which should have been given priority but were not. Mr.

Solomon further stated that, as previously indicated in the emails to him over the preceding few weeks, the Employer was no longer satisfied with the Employee's "overall performance".

13. On June 1, 2015, the employee's vacation leave form dated May 8, 2015 applying for leave commencing June 10, 2015, as signed by Mr. La Barrie was delivered by the Employee to Michelle Collins, Mr. Solomon's Assistant. On the same date, the Employee was informed by Ms. Collins that Mr. Solomon wanted to meet with him at 8 30am in the morning of June 8, 2015.
14. On June 3, 2015 the Employee's application of vacation leave dated May 8, 2015, was canceled by the Employee and a new one dated June 3, 2015, for vacation from June 8th to 19th, 2015 was submitted in its stead. The old form was cancelled by a line running diagonally across the page with the word "REVISED" written above it. The replacement form bore the words "Not Approved" in manuscript near the right bottom corner. It was not endorsed by Mr. La Barrie and /or Mr. Solomon.
15. On June 04, 2015, the Employer issued a detailed warning letter to the Employee which reads as follows:

"...

Re: Unsatisfactory Performance and Meeting of Deadlines and Deliverables

Mr. Burns:

This document is to formalize what has been expressed to you verbally throughout the Month of May 2015 and in email correspondence between me and you as to your failure to meet deadlines and deliverables to assigned tasks from December 2014 to date.

During the last week of May, 2015, 2 employees have filed complaints with me directly in regards to your unprofessional communication. These complaints will be investigated. A basic requirement of the Human Resource Manager position is the ability to exercise discretion, judgment, sensitivity and confidentiality thereby demonstrating a high level of professionalism at all times and leading by example.

I would also like to note that in March 2015, the University made additions to the HR staff, an HR Assistant, to provide you with the requested support to assist you in completing the projects detailed below. We have worked with you to ensure proper resourcing of the HR function including access to the US HR contact.

Despite our attempts to support you, there is little to no change in your ability to produce work on time and with an acceptable degree of accuracy.

The assigned tasks that are late and incomplete are detailed below:

Agreed to deadlines as to the completion of a revised and updated AUA Staff Employee Handbook:

- *9th Jan- Asked to review a new draft of the employee handbook sent by Mr. Sclafani (incomplete)*
- *6th Feb- Working on the latest draft of the employee handbook and was to distribute it to the managers (timeline: immediately). (distributed, handbook still incomplete)*
- *20th Feb- Employee handbook to be recirculated to all managers (deadline 20th Feb) for implementation on the 1st April. (Incomplete)*
- *6th Mar- The Employee handbook was circulated to all however they asked you to make the suggested changes so they could read it without the edits included and resend to the managers. (incomplete)*
- *8th May- Still awaiting immediate delivery of employee handbook edits and final copy (incomplete)*
- *26th of May acknowledging receipt of Handbook Final draft presented to myself and Mr. La Earrie, but not shared with the management team that worked on the handbook including US Management. Please note that I am off island on May 26, 2015 on approved time off and have not yet review the final draft for quality of work or completeness.*

Other Assignments that remain incomplete or outstanding:

- *Employee evaluation policy and procedures; to include evaluation forms*
- *Vacation days excel sheet/ calendar by department*
- *Report of staff lateness, sick days & absences on a weekly basis- there is an attendance report being circulated by Seymone*
- *Training schedule (incomplete schedule submitted as there was no budget attached) Another scheduled was provided in Amy 2015 with TBA entered under "Facilitator" and "Dates and Duration", no budget and no training included to educate staff on the new employee handbook, SPOT Awards program or to conduct Unlawful Harassment & Discrimination training.*
- *Disaster policy (incomplete)*
- *Health and safety policy (incomplete)*
- *Required letters of engagement for new hires or new positions are not issued in a timely manner and within the requirements of Antigua Labor Code*
- *Job descriptions have not all been revised and issued in a timely manner*

- You placed the University in a compromised position with regards to employee Renee Woods. You were asked to provide a report on the case. One has never been provided. The deadline date came and went with no report.
- You issued a letter to an employee without having investigated the matter. The matter went before union. The letter had to be retracted due to inaccuracies and lack of investigation and jeopardized AUA and Union relations.
- Employee files are disorganized and lack necessary content and documentation.

I am requiring you to provide dates of delivery for my review and approval that you will meet in regards to all of the above listed outstanding items by June 12, 2015.

This warning serves to provide you with a formal notice that your performance is not satisfactory and does not meet the requirements of the HR Manager for American University of Antigua. Further and/or any additional instances of failure to meet deadlines, failure to follow instructions and a failure to satisfactorily perform your duties as a Human Resource professional will result in disciplinary action up to and including termination of your employment."

16. On Friday June 05, 2015, while the approval of his revised application was still pending, the Employee issued an email to staff and copied to Mr. Solomon advising as follows: "Please be advised that I will be on vacation as of Monday June 8, returning on Monday June 22. In my absence, kindly direct all HR matters to Mrs. Seymone Smith, HR Assistant."
17. On June 5, 2015, Mr. Solomon's Assistant Michelle Collins reminded the Employee via telephone that Mr. Solomon wanted to see him at 8:30 on Monday June 8, 2015.
18. On June 5, 2015, Mrs. Smith, the HR Assistant, spoke to the Employee enquiring as to the responsibilities and pending matters she would have to handle in his absence. The Employee's response was that he would send a list of matters to Mrs. Smith as soon as he completed it.
19. On June 8, 2015 Mr. Solomon sent an email to the Employee reminding him that he had no permission to proceed on vacation from June 8th. Nevertheless, the Employee failed or refused to report for work on that date or anytime thereafter.
20. By letter dated June 13, 2015, the Employee was dismissed on several grounds including gross misconduct. In that letter the Employer stated:
"In the circumstance, your employment with the American University of Antigua is hereby terminated forthwith for gross misbehaviour, gross negligence (including but not limited to inaccuracies with respect to employee information) dereliction of duties,

failing to follow established procedures regarding your vacation leave application, failing to report for duties, failing to complete urgent and critical assignments before taking vacation leave, failing to provide the requested timeframe for completion of specified tasks prior to taking vacation leave, failing to make any or any proper arrangements for an adequate hand over of duties prior to going on vacation leave, and generally unsatisfactory behaviour and poor work performance.

The Proceedings

21. Being dissatisfied with his dismissal the Employee commenced these proceedings contending that he was unfairly dismissed and claiming compensation therefor. In his Memorandum of Claim filed on November 12, 2015, the Employee averred that:
 - a) Whenever he applied for annual vacation he would submit the form to the Deputy Director for his signature of approval. It was not part of the procedure for him to present the application form to the Vice President. It was necessary to obtain final approval from the Vice President only in situations where he requested pay in lieu of vacation.
 - b) Contrary to the Employer's negative conclusions about his performance, he denied that he was inefficient and could not be trusted. However, he admitted that he was experiencing several challenges which caused delays and resulted in his failure to complete several tasks in a timely manner.
 - c) After his application for vacation leave commencing on June 10, 2015, had been approved, his airline advised him that in order to meet his event date in the UK, he was required to travel no later than June 9, 2015. As a result, he cancelled his application which had been already approved and submitted a fresh application for the commencement of his vacation 2 days earlier. He submitted it Mr. La Barrie who declined to endorse it and directed him to present it to Mr. Solomon for approval.
 - d) Rather than dealing with his revised application, the Vice President decided that he wanted a meeting on June 8, 2015, on which date his 5 year old son had to undergo urgent medical treatment followed by a surgical intervention on June 9, 2015.
 - e) Before being informed on June 13, 2015 that he had been dismissed, he had complied with Mr. Solomon's request by submitting completion dates for various outstanding tasks.

- f) The Employer denied him a fair hearing before coming to its decision to terminate his employment.

22. By its Memorandum of Defence filed on December 31, 2015, the Employer joined issue with the Employee and disputed his claim of the following grounds:

- a) All matters in respect of the Employee vacation, request for vacation leave and pay in lieu required the approval of the Mr. Solomon in accordance with a procedure well known to the Employee.'
- b) On June 1, 2015, the Employee met with the Vice President's Assistant, presented her with the initial application form dated May 8, 2015 as signed by Mr. La Barrie, and requested that it be given to Mr. Solomon for his approval. Later on that date, the Employee was invited to a meeting with Mr. Solomon on July 8th at 8.30 am.
- c) When the Employee prepared the new vacation form on June 3, 2015 for vacation commencing June 8, 2015, he took it to Mr. La Barrie who refused the application and directed that he seek Mr. Solomon's approval. The Employee never submitted the replacement application to Mr. Solomon for his consideration and approval.
- d) On June 5, 2015, at approximately 2:24 pm the Employee sent an email to all staff, including Mr. Solomon and Mr. La Barrie, informing them that he would be on vacation "as of June 8th, returning on June 22nd" and that they should direct all HR matters to his Assistant, Ms. Smith. Later that day, at approximately 2:49pm, Mr. Solomon reminded the Employee of the scheduled meeting at 8:30 on June 8, 2015.
- e) Notwithstanding the Employer's advice to the Employee on June 8, 2015, that he had no permission to commence leave on that date, the Employee did not show up for work on that date. In effect, he went on leave without the requisite approval or permission.
- f) In relation to his unsatisfactory performance, the Employee had failed to provide the Mr. Solomon with a timetable for the completion of outstanding tasks but instead he proceeded on the vacation without any reasonable explanation.

Discussion

23. Under section C 58 of the Antigua and Barbuda Labour Code (the Labour Code), a dismissal shall not be unfair if an employer assigns a good reason therefor and acted reasonably under the prevailing circumstances. Subsection (1) of that

section provides that misconduct is a good reason provided that there is a good factual basis for the same. In this case, the Employer's principal reason is that of gross misconduct constituted by the Employee's absence from work on purported vacation without any authorization or permission.

24. As to the factual basis, suffice it to say, we refer to paragraph 14 above and find that the Employee had no permission or authorization from the Employer to proceed on vacation leave over the period July 8th to July 19th, 2015. Accordingly, the Employer discharged its evidentiary burden of establishing good cause for the dismissal.
25. In addition to proving the factual basis for the assigned reason, section C 58 also requires the Employer to prove as a matter of fact that it acted reasonably under the circumstances. In this case, the term "under the circumstances" as used in subsection (2) has particular significance. The following factual aspects of the surrounding circumstances are noteworthy:
 - a. The Employee held the senior position of Human Resources Manager, and was "responsible" for 129 members of staff. His duties and responsibilities, as summarized at paragraph 3 above, clearly demonstrates the wide scope and significance of his role in the Employer's organization.
 - b. The Minutes of the Managers meeting, referred to at paragraph 5 above demonstrate the Employer's concerns about the Employee and his department.
 - c. The preparation of the Staff Employee Handbook and the other outstanding assignments specifically listed in the warning letter dated June 4, 2015 and reproduced at paragraph 15 above, signify the weight and far reaching impact of the work required of him.
 - d. The Employer had repeatedly pressed the Employee for an improvement in his performance, which culminated in the said warning letter.
 - e. The Employee, being well aware that he was contractually bound to report to both Mr. La Barrie and Mr. Solomon did not submit his initial application for leave to the latter until 24 days later on June 1, 2015.
 - f. On June 1, 2015, while Mr. Solomon's approval or concurrence was still pending, the Employee failed to respond to his request for a meeting on July 8, 2015 to get an update on the outstanding matters.

- g. On June 3, 2015, while the reaction of Mr. Solomon was still pending and without responding to the request for a meeting on July 8, 2015, the Employee canceled his initial application and submitted a fresh one to Mr. La Barrie to commence his leave 2 days earlier on July 8, 2015. That fresh application form was not submitted to Mr. Solomon.
 - h. On June 5, 2015, while the outcome of his application was pending, and having received the warning letter and not responding to it, and while Mr. Solomon awaited his response to attend the proposed meeting on July 8, 2015, the Employee notified Mr. Solomon and all staff that he would be "on vacation commencing Monday June 8th, returning on Monday June 22nd".
 - i. Having failed or refused to attend the proposed meeting with Mr. Solomon, and having failed to report for work on July 8, 2015, the Employee made no contact with Mr. Solomon on that date.
 - j. By email dated July 8, 2015, Mr. Solomon informed the Employee that he was expected to report for work the following day but he failed to do so or to communicate with the Employer.
26. In light of the surrounding circumstances, the Employer concluded that the Employee's behavior was deliberate or reckless and amounted to gross misconduct. Moreover, the Employer concluded that the Employee's conduct resulted in an irreparable breakdown of trust and confidence which it had reposed in the Employee.
27. In his written closing submissions on behalf of the Employer, learned Counsel, Dr. Cort cited several useful authorities including the judgment of this Court in **Ref. No. 38 of 2003: Nicole Potter v. Jeweller's Warehouse**. In that case, the employee Assistant Manager was dismissed on the ground of misconduct. It was held that although the employee's conduct was not deemed to be dishonest, her conduct was tantamount to gross misconduct. In the end, it was held that the dismissal was not unfair on account of her seniority and the consequential loss of trust and confidence in her.
28. Learned Counsel also relied on the persuasive authorities of **Neary v Dean of Westminster [1999] IRLR 288 ; Jupiter General Insurance Co v Shroff [1937] 3 All ER. 67** to underscore the significance of the nature of the employer's business and the significant role played by the dismissed employee within the organization. Based on those authorities, with reference to the Employee, Dr. Cort submitted that "...being the HR Manager of a large medical school and taking unauthorized vacation while simultaneously not making any

arrangements for a proper or any handing over to the HR Assistant in light of all the concerns, complaints and warnings would be tantamount to behavior that would 'interfere with and prejudice the safe and proper conduct of the business' of the Employer and therefore justify immediate dismissal". We agree.

29. We also note Counsel's reliance on the cases of **Clouston & Co. Ltd. v Corry [1906 AC 122]** and **The Post Office v John Foley 200 WL 1084434**. Based on the former case we are convinced that the Employee's misconduct was so "inconsistent with the fulfilment of the express and implied conditions of service" that his immediate dismissal was justified.
30. Based on the pleadings, the preponderance of evidence and the submissions of the parties, it is our opinion that the Employer acted reasonably under the circumstances. In other words, the Employer's action in dismissing the Employee fell within a band of reasonable responses which a reasonable employer would have adopted in the circumstances. As such, it passed the test of reasonableness set out in Section C 58 (2).
31. Further, we agree that the conduct demonstrated by the Employee amounted to gross misconduct of such a magnitude that the employment relationship could not reasonably be expected to continue. Thus summary dismissal under section C 59 (1) (a) of the Labour Code was justified.
32. For the reasons stated above, we are constrained to dismiss the Employee's claim in its entirety.

Dated this 15th day of February 2024



Charlesworth O. D Brown
President



St. Lawrence de Freitas
Member

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Megan Samuel-Fields
Member