

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/65 of 2018

BETWEEN:

BOYCATT BALTIMORE

Employee

And

DICKENSON BAY HOTEL MANAGEMENT Ltd.
t/a SANDALS Grande Antigua Resort & Spa

Employer

Before:

The Hon. Charlesworth O.D Brown

President

The Hon. Samantha May-Francis

Vice-President

Appearances:

Mr. Peyton J.V. Knight of Peyton J.V. Knight & Associates, Attorneys-at-Law for the Employee

Ms. E. Ann Henry KC of Henry & Burnette, Attorneys-at-Law for the Employer

2021: November 04

2024: January 12

Employee dismissed for conspiring to steal and stealing Employer's property - Employer informing Employee of basis for its conclusion that its property had been stolen, asking what he knew about the matter and suspending him with pay for 5 days pending "continued discussion" - Employer conducting an investigation in absence of Employee - Employer informing Employee of its conclusions and summarily dismissing him immediately upon his return to work - Whether the Employer acted reasonably under the circumstances

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JUDGMENT

Brown, P

Background

1. The Employer is a well-known corporate body carrying on business as a leading hotelier in Antigua and Barbuda. It employed the Employee as a Cook with effect from May 19, 2009, and summarily dismissed him by letter dated August 7, 2015, for conspiring to steal and stealing "one case of shrimp and one case of



salmon" from the Employer. At the date of his dismissal, his weekly wages were \$745.23.

2. Being dissatisfied with his dismissal, the Employee commenced these proceedings claiming that he was unfairly dismissed. The Employer joined issue with the Employee on his claim and maintained that he was guilty of misconduct which was serious enough to warrant his summary dismissal.
3. For the purposes of its business, the Employer operated a Stores Department and a Butcher Shop. Meat and other products required for preparation in the Employer's restaurants are stored in the Storeroom. From time to time, selected items requisitioned by the Executive Chef, are removed from the Storeroom, delivered to the Butcher Shop and dealt with accordingly.
4. On or about July 20, 2015, the Employee who had hitherto held the position of Kitchen Supervisor, was temporarily redeployed to "help out" in the Employer's Butcher Shop in the absence of another worker who was then on approved vacation. Apart from his general knowledge of how the various departments interacted with each other, the Employee received no special training or specific instructions in relation to his duties in the Butcher Shop.
5. On or about July 20, 2015, selected meats and the related requisition were delivered to the Butcher Shop from the Storeroom. The case of shrimp and the case of salmon were not listed on the requisition. The next day, the extra items were collected by Mr. Eficel Finch, a worker in the Storeroom, removed from the Butcher Shop and taken to the "back of the house area".
6. On July 21, 2015, Mr. Patmore Martin, the Security Manager, received a report from Ms. Ordina Stewart, Security Supervisor, that the extra items were found in the Employer's garbage compactor. The items were retrieved and the matter was reported to Mr. Gaurav Sindhi, the General Manager. On that day, as a part of his investigation, Mr. Martin spoke to Mr. Finch and requested a written report from him as to why he removed the items from the Butcher Shop and left them at the back of the house.
7. Mr. Finch issued a handwritten statement dated July 27, 2015 in respect of which he was questioned by Mr. Martin. A summary of Mr. Finch's explanation to Mr. Martin was typed (presumably by or on the instructions of Mr. Martin), dated July 31, 2015 and signed by Mr. Finch.

8. At the Employer's request, the Employee also issued a handwritten statement dated July 31, 2015. In addition, other manuscript statements respectively bearing the same date were issued by Darron David, Mark Hadeed, Martin Ferris, other workers who were based in or associated with the Stores Department. Ms. Stewart also issued a typed report bearing that date.
9. On July 31, 2015, the Employee was summoned to a meeting with Mr. Sindhi and Ms. Veronica Carlos, the Human Resources Manager, "to discuss the incident on July 21, 2015". At the end of the meeting, the Employee was informed of the Employer's intention to conduct an "in-house investigation" and that he was being suspended with pay for the ensuing 5 days. At that time, the Employee was also told that upon his return to work the Employer would engage him in "continued discussion" after the investigation.
10. Upon the Employee's return to work on August 6, 2015, he was summoned to a meeting at which he was summarily dismissed. The dismissal was formalized by a letter dated August 7, 2015, which included the Employer's findings of its investigation and the statement that the termination was effective the previous day, August 6, 2015.

Discussion

Statutory Requirements

11. The fundamental statutory requirements for the determination that a dismissal was not unfair are that the employer (a) had a good reason, with a sound factual basis, under Section C 58 (1) of the Antigua and Barbuda Labour Code (the Code) and (b) acted reasonably under section C 58(2). In cases involving the strong measure of summary dismissal, in order to discharge its burden of proving that the dismissal was not unfair, the employer must provide weighty and convincing evidence to establish the factual basis for the dismissal and also that it acted reasonably.
12. In accordance with section C 10 of the Code, once an employer has issued a dismissal letter, the substantive testimony of facts which the employer is at liberty to introduce at trial to prove that the dismissal was not unfair is largely limited to those recited in the dismissal letter.
13. If an employer is to succeed in justifying summary dismissal, which is permissible under section C 59 (1) of the Code, the misconduct must be demonstrably so serious as to reduce the requirement for procedural fairness towards relative insignificance. One of the three types of misconduct identified

in that section is when the employee's behavior "clearly demonstrate that the employment relationship cannot reasonably be expected to continue".

The Dismissal letter

14. The factual contents of the dismissal letter are such that the Employer should have been circumspect in its approach towards disciplinary action against the Employee. The grounds for that conclusion are evident in the letter itself, and are noted below.
15. On July 31, 2015, Mr. Sindhi and Mrs. Veronica Carlos, Human Resources Manager, and the Employee "met to discuss" the matter which transpired 10 days earlier when the case of shrimp and the case of salmon were found in the compactor. That meeting appears to have been essentially concerned with a fact-finding inquiry. In light of his explanation, no allegation was made against the Employee.
16. The meeting was not a disciplinary hearing or labelled as such. There is no evidence that the Employer conveyed the seriousness of the matter to the Employee, it did not specify any allegation of conspiracy of theft or theft against the Employee; he was not told that disciplinary action was being contemplated against him; and that his employment was in jeopardy. The Employee was merely informed that the Employer was conducting an "in-house investigation" and that he would be suspended with pay for 5 days, after which he would be further engaged in "continued discussion".
17. As it turned out, upon the Employee's return to work after the suspension, he was presented with the dismissal letter. In it, the findings of the investigation were outlined to him for the first time. According to the Employer, upon hearing of its findings, the Employee offered no "counter argument". As a result, the Employer stated:

"You offered no counter argument to the evidence presented to you.

Mr. Baltimore, Management having concluded its investigation is of the view that you along with other members of staff conspired to steal from the Company and has taken a decision to terminate your employment effective Thursday August 6, 2015 for the theft of the Hotel Property as this misconduct warrants your summary dismissal."
18. Based on the contents of the dismissal letter, it is clear to us that the Employer relied heavily, if not exclusively, on Mr. Martin's report and rushed to judgment without any or any sufficient regard for procedural fairness. In any event, on the

face of it, the facts recited in the dismissal letter were not sufficient clear, cogent and weighty to justify summary dismissal. In our opinion, a reasonable employer armed with the findings which the Employer had, should have addressed its mind towards full compliance with the principles of natural justice and good industrial relations.

The Evidence

19. It is noteworthy that neither Mr. Sindhi nor Ms. Carlos, who were the only ones present at both meetings with the Employee, provided a witness statement and testified at the trial. Moreover, the testimony of Ms. Donna Jean Samuels, the Human Resources Manager, whose employment commenced years after the dismissal, was based largely on what she gleaned from the Employer's records. Since she had no direct involvement in the matter, her evidence is of limited weight. As a result, the Employer relied almost exclusively on Mr. Martin's evidence which in turn was wholly based on his investigation and his conclusions.
20. As we understand Mr. Martin's testimony, his conclusions which were adverse to the Employee appear to have been heavily influenced by what Mr. Finch said to him. In our estimation - having stated that his handwritten statement was false, and deciding to "come clean" by attempting to implicate the Employee - Mr. Finch was not a reliable source of information. In the circumstances, it was not reasonable for Mr. Martin to place such heavy reliance, as he apparently did, on what Mr. Finch said to him.
21. The evidence of the Employee, vis-à-vis that of Mr. Martin is noteworthy. He testified that after his suspension, Mr. Martin never spoke to him during the investigation; he never saw and was never told about the other statements from his co-workers; nobody ever told him that Mr. Finch or any of the other workers implicated him in the alleged conspiracy; he never saw and nobody ever told him that there was CCTV footage showing the shrimp and fish being taken away from the Butcher Shop.
22. As a matter of fact, we find that the Employee was not informed of the outcome of the investigation. In particular, there was no "continued discussion", as promised by the Employer, after the five-day suspension. Upon his arrival at the meeting on July 6, 2015, the Employee was merely told of his dismissal. With reference to Mr. Sindhi, the Employee testified that: "As soon as I reach in, he said 'I have strong evidence against you so I have to terminate you'. Nobody else said anything in the meeting".

23. In the final analysis, both in terms proof of his alleged misconduct, and the reasonableness of the Employer's actions, the preponderance of evidence favours the Employee. Accordingly, we are inclined to find that the Employer did not prove that the Employee conspired to steal and /or stole the Employer's property.

The Closing Submissions

24. We have taken into consideration the submissions of both learned Counsel. Ms. Henry, KC emphasized that there are limits to the degree of investigation which the Employer was required to conduct under the circumstances. While we agree that the Employer was not required to be certain that the Employee had actually committed the offence, we do not find that the facts as known to the Employer pointed strongly towards him as a culprit. Thus, the Employer's failure to comply with the principles of natural justice and its disregard for good industrial relations practices were decisive.
25. As to the Employee's duty to mitigate his loss after his dismissal, we have taken into consideration the useful authorities cited on behalf of the Employer.
26. As to Mr. Knight's submissions, we agree that the Employer failed to conduct a proper investigation and ultimately deprived the Employee of his right to be heard under the circumstances. In particular, we agree that the Employer did not prove to the required standard that the Employee was guilty of charges against him and that it acted reasonably.
27. In terms of the dismissal of the Employee as part of the set of "blanket dismissals" for conspiring to steal and /or the actual theft of the shrimp and salmon, suffice it to say, we are persuaded by the Employee's submission that the prerequisite conditions were not met.

Conclusion

28. In our opinion, notwithstanding the existence of a floating potentially good reason for the dismissal of one or more of its workers as at July 31, 2015, the Employer has failed to establish the required factual basis for dismissing the Employee for "conspiring to steal" and /or for "theft" of the Employer's property.
29. In any event, on the particular facts of this case, the Employer acted unreasonably by failing or refusing to:
- fully involve the Employee in its investigation;
 - inform the Employee of its findings as the investigation progressed;
 - provide him with copies of statements made by other workers;
 - advise him of the outcome of the investigation at the end of the process;

- e. inform him of any specific allegations against him;
- f. warn him that his employment was in jeopardy;
- g. provide him with an opportunity to confront his accusers;
- h. convene a disciplinary hearing; and
- i. provide the Employee with a reasonable opportunity, by himself or with his representative, to be heard in his own defence.

30. It is abundantly clear to us that neither the adverse statements of Mr. Finch, nor any of his other co-workers, nor the CCTV footage shown at trial, nor the Employer's findings after the investigation, nor the evidence of Mr. Martin were jointly or severally sufficient to dispense with the procedural fairness to which the Employee was entitled. To the contrary, the evidence, as a whole underscores the Employee's right to a fair hearing, one of the fundamental pillars of natural justice.

31. In the premises, we declare that the Employee was unfairly dismissed and is entitled to compensation, which we assess as below.

Compensation

32. Having regard to the relevant statutory provisions, we will consider awards of compensation under the following selected headings:

a. Notice Pay

Since the Employee was paid weekly, **we award the sum of \$745.23**, being the equivalent of one week's pay in lieu of notice.

b. Loss of Protection from Unfair Dismissal

The Employee worked from May 19, 2009 to August 6, 2015, a total of 6 years and approximately 3 months. Assuming a five-day work-week, his daily rate of pay was \$149.05. In the circumstances, **we award the sum of \$11,178.75**, being one day's pay for each month of employment.

c. Immediate Loss

As to the Employee's duty to mitigate his loss, we note the paucity of his evidence. In his witness statement, he stated that he was without gainful employment for "around" six months after his dismissal. He stated that he asked "plenty people" for work but made no written applications. Under cross-examination, he testified that he is a specialist Chef and had started working as such before his employment with the Employer. At the date of trial, he was engaged from time to time as a private Chef at 4 leading hotels. Further, he testified that he had engaged in self-employment doing his "own thing" and selling from home, but did not disclose his earnings therefrom.

In the circumstances, bearing in mind the award of Notice Pay, and applying our guesstimate of a reasonable time within which the Employee

should have found comparable alternative employment, we award the sum of \$8,942.76, being the equivalent of 3 month's pay less \$745.23 awarded above.

d. Future Loss / Manner of Dismissal / Exemplary Damages

There is no or no sufficient evidence to ground any awards under these headings.

Order

33. By reason of matters aforesaid, we order as follows:

The Employer shall pay to the Employee the total sum of \$20 121.51, as compensation for his unfair dismissal, no later than February 15, 2024.

Dated this 12th day of January 2024.



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Charlesworth O. D. Brown
President



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Samantha May-Francis
Vice President