

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/26 of 2021

BETWEEN:

JENNIE AUSTIN

Employee

and

AFRICAN BEAUTY CULTURAL MARKET LIMITED

Employer

Before:

The Hon. Samantha May- Francis

The Hon. Judith A. Dublin

The Hon. Hesketh A. Williams

Vice President

Member

Member

Appearances:

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

Mr. Cosbert Cumberbatch of Cumberbatch and Associates, Attorneys-at-Law for the
Employer

2024: March 27

2024: June 28

JUDGMENT

Employer dismissed employee summarily after several allegations of misconduct and issuing the Employee with several warning letters- The Employer did not conduct any investigation or disciplinary hearing- whether the circumstances warranted a summary dismissal- whether the dismissal was unfair

Background

1. The Employer is a registered company that imports, sells, and distributes beauty products and is the owner of a retail store in the city of St. John's in Antigua.
2. The Employee commenced employment with the Employer as a Sales Representative in the retail store in April 2018. She worked a six (6) day work week and was paid \$393.00 per week.



3. The Employer issued the Employee three (3) warning letters between April 2019 and July 2019. In the first warning letter issued on April 1, 2019, the Employer alleged that the Employee on March 29, 2019, refused to obey the Employer's directive to place merchandise on the shelves for display in the order and manner desired by the Employer. The Employer also alleged that the Employee had been caught stealing three (3) bottles of Perfecting Serum and disposed of the items in the garbage suspecting she was seen by another employee.
4. By letter dated April 10, 2019, the Employee's Representative Mr. Samuel James wrote to the Employer denying the allegations of unprofessional behaviour and theft levied against the Employee. The Employee alleged that the Employer engaged in unprofessional conduct and disrespected her by shouting at her in the open store. Concerning the allegation of theft, the Employee denied the allegation and threatened the Employer with further legal action. She accused the Employer of attempting to force her out of work because she sought the intervention of the Labour Department on a separate issue, as the Employer had been paying her below the minimum wage standards of Antigua and Barbuda.
5. In the second warning letter dated 15th June 2019, captioned 'Third Warning Letter' the Employer alleged that the Employee had engaged in unprofessional and unacceptable behaviour at work. The Employer listed the unprofessional and unacceptable behaviour as - *'your tone of voice when speaking to your employer; reporting sick after a Public Holiday'; Reporting to work late; and Taking a sick day almost on a weekly basis.* The Employer warned the Employee that this was the final warning.
6. In the third warning letter dated July 4, 2019, the Employer alleged that on July 3, 2019, the Employee was caught using products from the display stand, particularly nail polish, to paint her nails. The Employer requested that the Employee reply to the warning letter by July 8, 2019, to indicate whether she agreed to improve her attitude.
7. The Employee's Learned Representative Mr. Samuel James also responded to the second and third warning letters by letter dated July 16, 2019. The Employee denied the Employer's allegations. She countered that the Employer frequently spoke to her in a derogatory manner. She stated that the law allows her to report sick after a public holiday once she is genuinely ill. She placed the Employer to strict proof of her employment records to substantiate its allegation that she frequently reported late for work and the allegation that she was sick every week. Once again, the Employee threatened further legal action and warned the Employer that she was inclined to resign and claim constructive dismissal should the false allegations continue.

8. By letter dated September 21, 2019, the Employer terminated the employment relationship.
9. On January 7, 2020, Mr. James wrote to the Employer claiming unfair dismissal and demanded compensation for unfair dismissal.

Discussion

10. Given the Employee's statutory right as established by Section C56, and the Employee having raised the issue of unfair dismissal in this Reference, the onus is on the Employer to prove that the dismissal was not unfair. To that end, the Employer must prove that: (a) It had just cause for the dismissal under section C58 (1) of the Labour Code, and (b) it acted reasonably in dismissing the Employee in the particular circumstances prevailing at the material time.
11. The Employee admitted receiving several warning letters stating allegations regarding her conduct, performance, punctuality, and attendance. This included the three (3) letters to which reference was made in the dismissal letter. She went on to provide evidence of how she responded to each of them through her Representatives.
12. Based on the content of the dismissal letter, the Employee's dismissal was grounded on (a) the three warning letters which had been issued to the Employee dated April 1, 2019, June 15, 2019, and July 4, 2019; (b) her refusal to make changes to her performance and behaviour; and (3) she was caught sleeping while at work on September 5, 2019. The full text of the dismissal letter is hereunder set out:

" 21st September, 2019

*Mrs. Jennie Austin
c/o African Beauty Culture Market Ltd
Redcliffe Street
St. John's, Antigua*

Dear Mrs. Austin,

This letter serves to advise you that your services with African Beauty Culture Market Ltd is hereby terminated with immediate effect.

After several letters to you regarding your behavior on the job, you have refused to make any changes to the way you operate on a daily basis.

As recent as 5th September, 2019, you were caught sleeping on the job at 12:28 p.m., when you were supposed to be working,

Your behavior and attitude to your job have become intolerable and will no longer be accepted.

Please be advised that you are to call into my office on 12th day of October, 2019 to collect all other vacation and severance pay due and owing to you.

Your kindest consideration of the foregoing will be greatly appreciated.

Yours sincerely

*Zack Ibemere
Manager*

...

13. Under cross-examination, the letters from the Employee's Representative dated April 10, 2019 and July 16, 2019, were put to the Employer's witness Mr. Zack Ibemere. Curiously, the Employer admitted under cross-examination that it had not read any of the responses received from the Employee's representative. Having not read the letters, the Employer failed to challenge the allegations and matters raised by the Employee in her defence to the warning letters. Additionally, her responses were not considered by the Employer in its decision to terminate the employment relationship.
14. Concerning the reason that the Employee was dismissed for sleeping while at work, we note that the Employer failed to provide any particulars of the sleeping incident but for the alleged date and time. Interestingly, the Employee in her oral testimony indicated that her assigned lunch hour was between 12:00 pm and 1:00 pm. Her evidence is that during her lunch hour sometimes she would go to the back of the store where she would eat and rest after having to stand for long hours. She gave evidence that she knew nothing about the allegation that she was sleeping while at work until she received the dismissal letter and saw reference made to it therein.
15. The Employer alleges that the Employee was caught sleeping at the back of the store at 12:28 p.m. and he took a picture. He subsequently dismissed the Employee. The picture was not in evidence before this Court. Additionally, no witness was called by the Employer to give evidence of its testimony against the Employee.

16. Learned Counsel Mr. Cumberbatch argued that the Employee had a bad disciplinary record. She failed to make a personal commitment to improving her behaviour and did not personally respond to any of the letters from her Employer. He posited that the Employee was given a final warning that she would be dismissed if she engaged in further infractions.
17. The Employee gave evidence she did not know about the allegations against her before her dismissal. She learned of the allegations that she was sleeping on the job after she got the dismissal letter. The Employee was never charged with anything, there was no disciplinary inquiry or investigation into any of the allegations against her and she never had an opportunity to be heard in her defence. This is supported by the Employer's evidence of dismissing the Employee two weeks after taking a photo of her sleeping.
18. The Employer is therefore, left with the burden of proving that it could not reasonably expect to provide the Employee with an opportunity to be heard and that even if it had done so, it would have made no difference to the outcome. Based on the facts of this case, the Employer failed to discharge its burden.
19. The Court of Appeal in Civil Appeal No. 4 of 2003: **The Epicurean Limited v. Madeline Taylor**, in considering the judgment of this Court, reminded itself of the significance of natural justice. In paragraph 33 of the judgment, Rawlins J. A., as he then was, stated: **"The principles of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced back to ancient times, were known in medieval precedents and reached a 'high watermark' in their development in Dr. Bonham's case (1610) 8 Co. Rep. 113b. Indeed, we were reminded that, although their disobedience was obvious, even Adam and Eve were given the opportunity to speak in their defence before they were cast out from the Garden of Eden."**
20. With regard to the dictum of Learned Justice of Appeal and considering Sections C58 and 59 of the Labour Code, any denial of natural justice is an important consideration in determining whether the dismissal was fair. We reiterate, as we have done many times in this Court, that it is the right of every employee to have a fair opportunity to defend himself against any allegation or charge made against him. This is not a trifling matter to be taken lightly or viewed as a mere technicality. It is natural justice and a fundamental principle of common law. Its omission by an Employer may render any disciplinary action unsustainable and a decision to dismiss an employee unfair.
21. We find the evidence of the Employee to be reasonable and credible. It is impossible for us to say what the outcome would have been had the Employer

read the letters and had the Employer provided the Employee with a fair opportunity to explain herself before the Employer decided to dismiss her. In our estimation, having failed to read the Employee's responses and the Employee not having had the opportunity to respond to the allegation, which ultimately led to her dismissal, the Employer prevented itself from discharging its obligation to engage in a fair process. The Employer's decision to summarily dismiss the Employee, in our view, was not warranted in the circumstances.

22. Ultimately, we find that the dismissal was unfair. Accordingly, we assess compensation to the Employee as follows:

Notice Pay

23. Under this head, we award the sum of \$393.60, which is the equivalent of one week's salary.

Loss of Protection

24. The Employee worked for seventeen (17) months. Her daily rate at the date of her dismissal was \$65.60. Accordingly, we award the sum of **\$1,115.20**, the equivalent of one day's pay for each month of employment: $\$65.60 \times 17$.

Immediate Loss

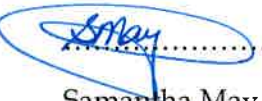
25. The Employee gave evidence that she commenced employment at Roti King on September 26, 2019, a mere five (5) days after her dismissal. She also gave evidence that she earned more than \$400.00 per week. We, therefore, make no award under this head.

26. The aggregate sum of **\$1,508.80** is therefore awarded to the Employee.

In the premises, we order that;

1. The Employer shall pay the Employee the sum of **\$1,508.80** as and for compensation for unfair dismissal.
2. The said sum of **\$1,508.80** shall be paid by the Employer no later than July 15, 2024.

Dated the 28th day of June, 2024


Samantha May- Francis

Vice President


Judith A. Dublin
Member


Hesketh A. Williams
Member