

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/17 of 2021

BETWEEN:

HORATIO FERDINAND

Employee

and

FOOD BROKERAGE SERVICES LTD

Employer

Before:

The Hon. Samantha May-Francis

President

The Hon. Hesketh A. Williams

Member

The Hon. Dalmer A. McCoy

Member

Appearances:

Mr. Alrick Daniel of the Antigua Trades & Labour Union, Representative of the Employee

Mr. Kendrickson Kentish KC, of Lake and Kentish, Attorney-at-Law for the Employer

2025: March 31

2025: July 25

JUDGMENT

May-Francis, P

Background

1. The Employer is a well-established distributor of food, beverages, and other grocery items in Antigua and Barbuda.
2. In its Memorandum, the Employer alleges that the Employee repeatedly disregarded company policies and procedures despite having been warned. Additionally, the Employee exhibited disrespectful behaviour when he refused to disclose the identity of the unknown third-party recipient who was copied on an email which the Employee sent to the Employer inquiring about his wages and vacation pay.



3. The Employee commenced employment on February 1, 2007, in the position of van sales operator. He earned a weekly wage of \$625.00 plus a commission of 0.05% of sales.
4. At the time of his dismissal, the Employee was employed as a Van Sales Operator and Sales Representative. He was, in the main, responsible for the sale and delivery of the products distributed by the Employer out of its warehouse to the Employer's customers and for collecting monies generated from the sale of these products on behalf of the Employer. In the course of his employment, the Employee utilised a motor van owned by the Employer.
5. By this Reference, the Employee alleges that the Employer unfairly dismissed him.

Legal Framework

6. Having accepted that the Employee had been dismissed, it is for the Employer to establish that the dismissal was fair by demonstrating that it had good cause for the dismissal and that it acted reasonably.
7. As to the reason for the dismissal, Section C10 (1) of the Labour Code provides:
Section C10 (1)

“Upon termination by an employer of an employee’s employment subsequent to the latter’s probation period, the employer shall within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reasons for the termination”.

Section C10 (4)

“An employer who fails to furnish either the statement or the certificate shall be estopped from introducing testimony as to facts which might have been recited in said statement or certificate in any proceeding testing the fairness of the dismissal or his liability for severance whichever is applicable”.

8. In **Cable & Wireless (West Indies) v Dalma Hill et.al.**, Learned Justice of Appeal Berridge J.A. stated:

The Court of Appeal held the view that within the ambit of Section 58 of the Labour Code the burden of proof was on the employer to show “just cause” for dismissing the respondents and that since summary dismissal constitutes as a “strong measure” the standard proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a Civil nature requiring a standard of proof on a balance of probabilities, since the matters to be proved were of a grave and weighty

nature, they would expect the evidence to be correspondingly cogent and weighty in nature and content.”

9. In determining the fairness of the dismissal, we considered Sections C58 and 59 of the Labour Code-

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 or 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 clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
(b) ...
(c) ...

C59 (2) Where an employee is guilty of misconduct in or in relation to 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.”

The allegations against the Employee

10. The Employer’s witness Mr. Leslie Salmon, General Manager, alleged that the Employee misconducted himself in that he:
- Deviated from approved routes, which constituted a breach of the Employer’s policy and for which he was previously warned on September 13, 2013

- Imposed 'arbitrary charges' on customers, inflating the rates for products without the Employer's authorization
- Deposited with the Employer a key which he had duplicated without the knowledge and consent of the Employer and which he passed off to the Employer as the van keys while retaining the original van keys. The Employer alleges this was a serious breach of policy for which the Employee was suspended on March 24, 2014.
- Failed to return the delivery van during the established operation hours for which he was issued a warning on April 10, 2014.
- Refused to disclose to the General Manager the name of the third party whom he had copied on an internal company email regarding serious discrepancies in accounting data in respect of the Employee's sales on April 23, 2014.

The allegations against the Employer

11. The Employee alleges that he was approved to commence vacation on April 8, 2014, and continue through April 30, 2014. Before beginning his vacation, Mr. Trevor Francis, the Administrative Supervisor, advised him that his salary and vacation pay would be deposited into his bank account on a weekly basis. However, up to April 23, 2014, he had not received any payments from the Employer.
12. Realising that no money had been sent to his bank account, he sent an email to Mr. Francis, copying the General Manager, Mr. Leslie Salmon, to enquire about his salary and vacation pay. Mr. Salmon responded to advise that his salary had been placed on hold due to variances in sales financials.
13. According to the Employee, this was the first time he was aware of the policy to withhold wages and vacation pay until variances are reconciled. The Employee stated that he subsequently met with Mr. Salmon on April 25, 2014, while on vacation and demonstrated through his records that there was no shortage of money collected on behalf of the Employer.
14. During the meeting, Mr. Salmon questioned him about the identity of the third person whom the Employee had copied on his email to Mr. Salmon. He admitted that he failed to disclose who the person was and responded, **"I do not have to tell you that."**
15. On his return to work on May 1, 2014, he was dismissed upon arrival when the security officer at the checkpoint to the Employer's premises handed him his dismissal letter dated April 28, 2014.

The Termination Letter

16. We will now address the Employee's submission that the Employer did not provide a precise reason for the dismissal. As part of his case the Employee raised the point that the contents of the dismissal letter dated April 28, 2014 do not meet the statutory requirements of section C10 of the Antigua and Barbuda Labour Code (the

Code) in that it did not provide the Employee with a precise statement of the reasons for dismissal. The Employee contended that the Employer is therefore estopped from advancing any evidence or a defence to the reasonableness of the dismissal.

17. The following excerpt from that dismissal letter is reproduced:

“Dear Mr. Ferdinand,

On Friday, the 25th of April 2014, I had a meeting with you and your Supervisor to discuss the discrepancy that was associated with your balancing just before you proceeded on your vacation.

As per company policy, your wages were withheld until a plausible explanation was given by you to your Supervisor for any variance. In the event that you both failed to come to a mutual agreement would then be held with me to help to resolve the issue.

On April 23rd, you sent an email to the Admin. Office Supervisor requesting pay. This was perplexing to me, because your immediate Supervisor, in relation to Van Sales, informed me that she had met with you to try to and come to an agreement to settle the discrepancy and had been unable to do so. She advised you to request a meeting with me in an attempt to settle the issues, as per policy.

In addition, you were fully aware of the company policy to put wages on hold until an agreement can be reached, since you had a situation a couple of weeks before. When you state in your email that you expected to be paid before meeting with me is a clear indication that you have little regard for company policies, since you were obviously expecting to go off on vacation, without giving a proper account for the significant variance in your balancing.

I wish to remind you that my meeting with the Van Sales operators is for their benefit as much as for the company's since I wanted to personally ensure that operators are given a fair chance to explain their situation and we do not have baseless and unfounded accusations like we have had in the recent past.

In a meeting on the 25th April, I took the opportunity to ask you, to whom you had copied your email to, since I did not recognize one of the email addresses as someone who works for the company. You answered: “I do not have to tell you”. I must admit I was taken back and shocked by your answer since I had expected to hear that it was done in error, or a friend, or the Union Representatives, or something along those lines. Had you responded in that manner the most that I might have said in that case, is that, out of courtesy you should have told me before. However, your response and refusal to disclose to whom you had copied the email shows that you have no respect for

management, or the security of the Company's operations, particularly, in light of how you handled another situation recently which was also grossly disrespectful to management.

As a result of your actions above actions, and in the circumstances, I am of the view that the relationship between you and the Company has reached the stage where the company cannot be expected to continue working with you. You have failed to abide by prior written warnings. As a result, I have decided to terminate your employment with this company with effect from May 1, 2014..."

18. We are of the view that the Employer sets out the facts and circumstances surrounding the alleged disrespect to management. The dismissal letter, though not concise, precisely stated the reasons for the dismissal as being disrespectful to management in his refusing to disclose the name of the third person to whom the email was copied. In the circumstances, Section C10 the Labour Code does not avail the Employee.
19. The Court will therefore consider the substantive matter, which is the fairness of the dismissal.

Analysis

20. The evidence of the parties does not differ in many aspects. The parties both accept that the Employee, in response to the Employer's enquiry about whom he had copied on an email, stated to the Employer, "I do not have to tell you". There was some vagueness as to whether the meeting came to an abrupt end because the Employer felt disrespected by the Employee's response, or whether the meeting ended since the variances were resolved.
21. We have read the letter dated April 28, 2014, which was issued to the Employee three (3) days after the Employer met with him. We also note that it is unsigned. However, both parties accepted it as the dismissal letter. The letter confirms that the Employer met with the Employee on April 25, 2014. It also noted discrepancies between the Employer's record and that of the Employee.
22. However, based on the documentary evidence, witness statements and vivo voce evidence of the witnesses, while we accept that the Employer had prior concerns with the Employee's conduct, it is apparent from the dismissal letter it was not the discrepancies or variances or previous findings of misconduct which led to the Employee's dismissal but rather the Employee's failure to disclose to whom he had copied the email sent to Mr. Salmon. The Employer contended that the Employee's response was disrespectful. We will therefore decide based on the facts and circumstances whether the Employee's conduct was so gross so as to warrant his summary dismissal.

23. In determining whether the dismissal was fair, the burden falls on the Employer to establish that it had (a) sound reason with a good factual basis for the dismissal and (b) to prove that it acted reasonably in dismissing the Employee in the circumstances.
24. There is no doubt in our minds that the Employer had concerns about the Employee. In its letter dated March 24, 2014, captioned “disrespectful conduct”, which was issued to the Employee approximately one month prior and which concerned the unauthorised duplication of the company van keys and unauthorised retention of the same, the Employer clearly stated that it considered the Employee’s actions to be dishonest and certainly felt disrespected by the Employee and therefore suspended him without pay.
25. Nonetheless, the Employer must convince us that in deciding to dismiss the Employee that it acted reasonably in the circumstances. There is no doubt that the Employee exercised poor judgment in not responding to the Employer’s enquiry concerning the third person to whom he had copied the email, especially given his evidence at trial that the email had been disclosed to his Union Representative. We note that the dismissal letter does not state that the Employer had determined that it had lost the trust and confidence of the Employee for having failed to disclose the identity of the third party, which loss of trust and confidence upon examination of facts can form a legal factual basis for termination even in circumstances where the Employee was immediately terminated.
26. Equally notable is the fact that the correspondence dated April 10, 2014, was issued to the Employee while he was on vacation, instructing him to provide a written report concerning his decline in sales on or before May 5, 2014. There was no correspondence to the Employee indicating that his wages and vacation pay were being withheld due to the variances, as per any Employer’s alleged policy.
27. Additionally, the Employer acknowledged that the purpose of the meeting on April 24, 2014, was to reconcile the variances and that reconciliation was successfully achieved. The Employer’s evidence is that it first raised the issue concerning who the email was copied to during the meeting on April 24, 2014. We also note that the Employer did not provide evidence that it had cautioned the Employee that it considered, firstly, that the Employee had violated any policy regarding email communication or breached confidentiality, and secondly cautioned him that his failure to respond was construed as disrespectful behaviour giving rise to gross misconduct. There was no indication that his job was in jeopardy. It was only upon his return to work that he realised that his employment had been terminated.
28. Based on the dismissal letter, we conclude that the reason advanced by the Employer for the dismissal was the Employee’s refusal to disclose the identity of the individual copied on the email which the Employer considered to be disrespectful. The fact that the Employer chose to issue the termination letter on the day the Employee returned from vacation is indicative that the decision to dismiss him was a

foregone conclusion in the absence of any caution that the Employee's job was in jeopardy, before the expiration of the Employee's vacation, and before further opportunity to respond to the determining of his fate.

29. We relentlessly continue to express that the principles of natural justice are essential when considering Sections 58 and 59 of the Labour Code. The termination of an employee is a traumatic event. As such, an employer is obligated, save in exceptional circumstances, to inform an employee of the allegations against him and to allow him to answer the claims and exculpate himself. There was no evidence that any specific allegations were put to the Employee, nor was he given any particulars of what was alleged against him, and he was not given an opportunity at any hearing to defend himself.
30. Moreover, in our view, the fact that an employer treats with an employee over an extended period of time in respect of several alleged acts of misconduct cannot override the application of the mandatory test of reasonableness, pursuant to SectionC 58(2) of the Labour Code.
31. For these reasons, we find that the Employer has failed the test of reasonableness.

Limitation

32. The Employer, in its application dated August 16, 2023, requesting an order vacating an ex parte trial and for the matter to proceed inter partes, raised as part of its application that the Reference was statute-barred, the matter having been commenced more than seven years after the dismissal. Limitation was, however, not pursued as a defence during the trial nor as part of the closing submission of the Employer. However, for completeness, we have indicated in previous decisions of this Court that we consider claims for unfair dismissal to fall within a special category for which the Limitation Act No. 6 of 1997 does not apply – **Rolston Matthias and West Indies Oil Reference 14 of 2008 and Angela Carey v Carlisle Bay Resort Reference C/6 of 2019.**

Compensation

33. Ultimately, since the Employer failed the statutory test of reasonableness, the dismissal was unfair. Accordingly, we assess compensation to the Employee having regard to the evidence of loss and mitigation as follows:

Notice Pay

The equivalent of 1 week's pay in the sum of **\$625.00.**

Loss of Protection

The sum of **\$10,750.00**, equivalent to one day's pay for each month of employment: \$125.00 x 86

Immediate Loss

The sum of **\$2,708.33**, the equivalent of 2 months' wages.

Outstanding Vacation Day

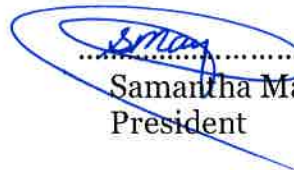
The Employee had to report for duty to attend the meeting on April 24, 2014, in the sum of **\$125.00**, which is equivalent to his daily rate.

34. The Court found that the Employee also contributed to the situation leading to his dismissal by refusing to answer a legitimate and reasonable inquiry from the Employer; the compensation award is hereby reduced by 20% to **\$11,391.67**.

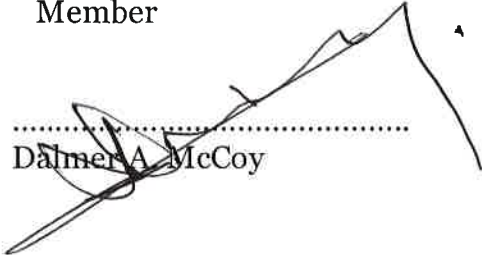
Order

35. We order the Employer to pay to the Employee the sum of **\$11,391.67** as compensation for his unfair dismissal on or before August 31, 2025.

Dated this 25th day of July 2025


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Samantha May -Francis
President

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Hesketh A. Williams
Member


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Dalmer A. McCoy

