

ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT

REFERENCE NO. C/76 of 2017

BETWEEN:

JUNIOR DAVIS

Employee

and

ANTIGUA AND BARBUDA TRANSPORT BOARD

Employer

Before:

The Hon. Samantha May- Francis

President

The Hon. Collin R. Maynard

Member

Appearances:

Mr. Sherfield Bowen of Bowen & Bowen, Attorneys-at-Law, for the Employee

Mr. Jonathan Marshall of Marshall and Company, Attorneys-at-Law for the Employer

2024: May 31

2025: October 17

JUDGMENT

May-Francis, P

The Honourable Samantha May-Francis, The Honourable Hesketh A. Williams and The Honourable Collin R. Maynard heard this Reference. It has become necessary in delivering the Judgment to invoke Section 3 (6) of the Industrial Court Act, The Honourable Hesketh A. Williams having died before the delivery of this Judgment. Section 3 (6) provides:

“The Court may act notwithstanding any vacancies in its number or in the absence of any member from the hearing or any part thereof; and no act, proceeding or award of the Court shall be called in question or invalidated by reason of any such vacancy or absence”.

Accordingly, this judgment is being delivered.



Background

1. The Employee presented a Reference on August 2, 2017, claiming unfair dismissal.
2. The Employer resisted the Employee's claim and filed its Memorandum of Defence on August 18, 2017.
3. The Employer is a body corporate established by the Transport Board Act No. 13 of 1995 and its subsequent amendments.
4. The Employee commenced his employment on September 13, 2009, and last held the position of Security Supervisor/Administrator, having been promoted to that position on March 15, 2012, and last earned \$6,200.00 per month.
5. The Parties accepted that on August 30, 2013, the Employee fell while at work and suffered injuries to his right shoulder, right knee and right ankle. Thereafter, on or about September 2, 2013, Ms. Kascene Henry, Administrative Assistant to the Personnel Manager, referred the Employee to Dr. Patrick Matthews of NSA Medical Centre for examination. On September 3, 2013, Mr. Anderson Carty, then Operations Manager of the Employer, requested a written report of the incident from the Employee. The Employee responded on September 5, 2013. Also on September 5, 2013, the Employee underwent an MRI medical screening, the findings of which were consistent with the Employee having sustained a rotator cuff injury to his right shoulder.
6. On September 5, 2013, Mr. Carty responded to the Employee's correspondence of September 5, 2013. Mr. Carty expressed his disappointment that the Employee had copied his (the Employee's) report of the injury to Dr. Matthews. Mr. Carty insisted in his correspondence that the Employee was required to respond to management enquiries of whether he had any pre-existing injuries.
7. He was subsequently placed on certified medical leave from September 9, 2013, to October 28, 2013, as was evidenced by correspondence of September 9, 2013, from Dr. Matthews.
8. On September 9, 2013, Mr. Anderson Carty wrote to the Employee following a meeting held on September 8, 2013, expressing concerns about the Employee's performance at work.

9. On September 13, 2013, while on sick leave, the Employee responded to Mr. Carty's correspondence passionately denying and refuting matters stated in the correspondence from Mr. Carty.
10. While on sick leave on September 17, 2013, the Employee allegedly wrote to Mr. Carty advising that he was leaving the state to attend his grandmother's funeral in St. Vincent and also to meet with his local physician there.
11. On October 28, 2013, the Employee tendered a Medical Certificate extending his leave to November 11, 2013.
12. On October 29, 2013, Mr. Anderson Carty and Mr. Harry Josiah, the General Manager of the Employer, met with the Employee to discuss the "alleged disrespectful, unprofessional, inappropriate and negative reaction" of the Employee after receiving the correspondence from Mr. Carty on September 9, 2013.
13. On November 14, 2013, the Employee was dismissed.
14. Both parties submitted a bundle of documents, which included all the correspondence referred to above. The Employee's bundle also included a selection of the Employee's medical records. The Employee also gave oral evidence and was subject to cross-examination by the Employer's Representative, Mr. Jonathan Marshall. The Employer provided witness statements from Hubert Jarvis, who was the General Manager at the time of trial, and Ms. Taisha York, the Human Resources Manager, which were submitted as their evidence in chief. The Employer's witnesses were subject to cross-examination by the Employee's Representative, Mr. Sherfield Bowen. After the trial, the parties submitted written closing arguments.

The Issues

15. The Employer, having accepted that it dismissed the Employee, the sole issue for consideration by the Court is the fairness of the dismissal. The burden is on the Employer to prove that it did not unfairly dismiss the Employee.

The Evidence

16. This was a case in which the parties did not dispute the sequence of events, which is supported mainly by documentary evidence. The contention, however, concerns the Employer's defence that after the meeting on October 28, 2013, the Employee misconducted himself.
17. The Employer's position is that the Employee, by correspondence dated September 13, 2013, made several highly disrespectful remarks to Mr. Carty after Mr. Carty wrote to the Employee on September 9, 2013, having met with the Employee on September 8, 2013 to highlight his (Mr. Carty's) concerns with the Employee's performance and areas where improvement would be necessary.
18. In the dismissal letter, the Employer states:

“ We will not repeat or recite the specifics of your varying responses, as it is recorded in the files as a document for future reference. One thing that is very clear is that your letter does not dispute any of the points of evaluation that were laid out to you in our letter. To summarise your responses and your general reaction, which was elevated at the recent meeting, we are forced to reach the reasonable conclusion that there is a complete breakdown in the working relationship between the management and you. (See Article 22 of the Collective Agreement- Grounds for Dismissal)

In addition to the foregoing, on September 9, 2013, you submitted a sick certificate covering your absence from duty September 9th -October 28, 2013. However, we are informed that you travelled overseas on September 20, 2013, without the requisite medical clearance and further information of the Board.

Strangely however, at the meeting, you produced a type -written letter- with signature in original form- which you purported had been personally delivered to the S/O Ashton Francis at the Motor Pool on or around September 19, 2013, in the same envelope that contained your repugnant letter of September 12, 2013. It was obviously presented at the October 29, meeting, in a futile attempt to cover your track, after the fact. As you were informed this letter was never received by the Board and/or any of its representatives. And, in any event, had said letter had been so received, it would still not have been acceptable

without a support letter, giving clearance from medical doctor, to travel, which would be directly confined to reasons connected with your medical current health issues. As a matter of fact, this issue, by itself, is a most grave offence that would also warrant and support your termination.

In light of the above, the letter serves to document the General Manager's final decision, as espoused at the latter meeting, that your employment is forthwith terminated for the foregoing reasons, effective October 29, 2013.

Without prejudice, however, and mainly in consideration of current economic conditions, the Board will pay you the equivalent of severance equity for the period of your tenure, although we believe it is far from merited. This, nonetheless, should not be construed as any admission, on our part, that your dismissal was, in any way, unfair...."

19. Having read the dismissal letter, the Employee advanced two main reasons for the dismissal: (i) the alleged insolence of the Employee, which led to a breakdown in the working relationship between the Employer and (ii) the Employee's travel overseas without medical clearance from the Employer.

The Evidence

The Employee's evidence

20. The Employee's evidence is that, as a Security Administrative Officer, he had no scheduled work hours and was required to work ad hoc hours during the course of the workweek, including public holidays, Saturdays, and Sundays. On August 30, 2013, he fell on a step on the Employer's premises and sustained injury. He was referred to the Employer's medical doctor.
21. He submitted a report documenting the incident that occurred on September 3, 2013. According to the Employee, Mr. Carty had not been pleased that Dr. Matthews had prepared a report of injuries and placed him on certified sick leave from September 9, 2013, to October 28, 2013.
22. After submitting the medical leave certificate, on the same day, Mr. Carty gave him a letter in which several complaints of 'persistent failings' in his performance were levied against him. According to the Employee, before the letter of September 9, 2013, there were no verbal or written complaints made against him.

23. The Employee's evidence is that he responded on September 13, 2013. On October 28th, Dr. Matthews extended his sick leave until November 11, 2013. On October 29, 2013, the day he was scheduled to return to work, he submitted the medical leave certificate he had been granted on October 28, 2013. Mr. Carty refused to accept the medical leave certificate when he attempted to deliver it to him and instead demanded that he meet with him. He tried to give the medical leave certificate to the then General Manager, Mr. Harry Josiah, who also refused to accept it.
24. During cross-examination, the Employee conceded that Mr. Carty was the immediate supervisor. He also confirmed that he had been assigned additional duties, to which he had objected, after being transferred from Head Warden to Security Supervisor Administrator. The Employee maintained that Mr. Carty's letter of September 9th was given to him at the same time he handed Mr. Carty his medical leave certificate.
25. The Employee accepted that the letter of September 9th informed him that his performance would be reviewed over the next six months, and if he failed to improve, he would be at risk of termination. The Employee gave evidence that Mr. Carty was upset with him for having sustained an injury on the job. The Employee denied being angry when he responded and stated that his responses were respectful. The Employee maintained that his letter of September 19th was to inform the Employer of his travel and that he had submitted it.
26. However, he gave evidence that the moment he received the letter of September 9, 2013, he was of the view that trust had broken down between him and Mr. Carty. He did not initially contemplate that his job was at risk. Mr Josiah stated during the October 29, 2013, meeting that he would be transferred to another department. His evidence is that the meeting ended, and he was later called by Mr. Josiah, who advised him that, based on his salary, he had no other position in which he may be placed. Therefore, his employment would be terminated.
27. He testified that he was not aware that the meeting was disciplinary in nature; he was not advised before that he could have a representative with him, nor was he allowed to respond.

Employer's evidence

28. Ms. Taisha York, the Human Resource Manager and Mr. Hubert Jarvis the current General Manager, gave evidence on behalf of the Employer. From the onset, it must be stated that neither of these witnesses had first-hand knowledge or involvement in the termination of the Employee. Ms. York's evidence is that she commenced employment in 2014. Therefore, her testimony is limited to the records of the Employer. Mr. Jarvis gave evidence that he became the General Manager in 2014, sometime after the General Elections in Antigua and Barbuda. He also relied on the Employer's records in giving his testimony.
29. Ms. Taisha York's evidence is that it appeared that the Employer had some concerns about the Employee's performance. According to the records after the meeting on August 13, 2013, Mr. Carty issued a warning letter on September 9, 2013, to the Employee outlining some specific concerns he had in respect of the Employee's performance. He was informed in that letter that, if his performance did not improve, he was at risk of losing his job. The Employee responded to the warning letter on September 9, 2013.
30. According to Ms. York, from the record, it appears that the Management of the Employer, Mr. Carty in particular, had considered the Employee's response to be rude and insolent. Her evidence included the added issues of the Employee leaving the jurisdiction without medical clearance and the apparent attempt by the Employee to issue a correspondence dated September 17, 2013, purporting to have notified the Employer of his intention to travel out of state.
31. Under cross-examination, Ms. York confirmed that the Employee had not worked between August and November 2013, the Employee having been injured on August 1, 2013. Ms. York testified that, based on her experience and the medical record, Mr. James had been severely damaged. She also provided evidence that it was improper for an employer to require an employee to report to work while on sick leave, especially to face disciplinary action.
32. Mr. Hubert Jarvis, has been the General Manager of the Employer since 2014. At the time of the Employee's dismissal, Mr. Jarvis held the position of Product Development Officer. His evidence is that he knew about the Employee's termination, but he was not involved in the process. His testimony was therefore based on the Employer's records.

33. He was aware of the letter dated September 9, 2013, which Mr. Carty wrote to the Employee, but was not involved in the meeting which followed. Mr. Jarvis was unable to provide any evidence concerning the number of meetings the Employer had with the Employee. His evidence is that the previous General Manager decided to dismiss the Employee.

Legal Framework

34. Under the caption “Unfair Dismissals”, C 56 of the Antigua and Barbuda Labour Code (the Labour Code) states:

“Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.” 19. Section C 58 (1) sets out good cause for dismissal.

It states:

“A dismissal shall not be unfair if the reason assigned by the employer therefor (a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2).....

(b)

(c)

(d) or

(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held: Provided, however, that there is a factual basis for the assigned reason.”

35. Section C 58 (2) states:

“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.”

36. Section C 59 (1) makes provision for termination due to misconduct thus:

“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) committed a criminal offence in the course of his employment, without the consent, express or implied, of the employer; or (c) behaved immorally in the course of his duties.”

Resolving the Issues:

37. According to the Employer’s evidence and arguments, its decision to terminate the Employee is premised on the following facts:

- (i) The Employee’s letter of September 13, 2013, was rude and disrespectful, so gross that it caused the employment relationship to deteriorate to the extent that his employment could not continue.
- (ii) The Employee’s performance was below standard, a fact which was not disputed by the Employee and for which he was placed on a performance review for 6 months, which review process started on September 9, 2013, the date of communication by the Employer
- (iii) The Employee travelled outside the jurisdiction without the Employer’s permission and medical clearance.

38. We considered the evidence of all the witnesses and have carefully considered the sequence of events in this case. When the Employer communicated to the Employee that he was now being placed on a performance review, the Employee was on certified medical leave.

39. Ms. York gave evidence that the Employee did not return to work after being placed on certified medical leave. Therefore, there was no opportunity for the Employer on the date of dismissal to determine whether the Employee’s performance had improved since he was placed on performance review and before his dismissal. In our view, having communicated to the Employee that he was being placed on a performance review, which had not yet commenced since the Employee was not at work, the Employee’s allegedly unsatisfactory performance could not, in fairness, be the basis for the dismissal without more.

40. We also reviewed the Employee's response to the Employer's letter. The Employee, in his response, addressed each allegation of the Employer with an explanation. We struggled to find any statement made by the Employee that could be considered rude and insolent, which would have provoked the Employer to the extent that its response was to terminate the Employee.
41. It would be remiss not to comment on the meeting of October 19, which was convened at the Employer's request with the Employee while he remained on medically certified leave. According to the medical certificate, the Employee would be fit to return on November 11, 2013. Yet, the Employer summoned the Employee, who was on medically certified leave, to attend a meeting on October 28, 2013, to discuss his letter of September 13. It is unclear from the evidence whether this was a disciplinary hearing and whether the Employee was allowed to have representation with or even an opportunity to respond. In any event, we believe the Employer's actions were unreasonable and not in keeping with good industrial relations or the treatment of an employee on certified medical leave.
42. We will also address the issue of the Employee leaving the state without medical clearance. In correspondence dated October 2, 2013, Mr. Anderson Carty wrote to the then Chief Immigration Officer, Mr. Ivor Walker, advising that the Employee had left the country while on sick leave and without medical clearance or permission of the Employer, contrary to the policy of the Board. Suffice to say, that this Court has expressed that an employee travelling while on medically certified leave unless there is a clearly defined policy or agreement preventing an employee to do so without knowledge and consent of the employer, does not give rise to an offence, nor is the act of travel absolute evidence of the fitness of the employee and without more is of no consequence on the legitimacy of the medical certificate which he has been issued.
43. In relation to the Employee travelling while on sick leave, despite Mr. Carty stating that this act was against the Board's policy, we have no evidence before us which was deduced into evidence that the Employee was precluded from travelling without the Employer's permission or that he was under an obligation to inform the Employer of his travel. We note that in the letter dated September 17, 2013, the Employee states that, out of courtesy, he was informing the Employer of his travel plans. His evidence is that he gave the letter to another manager to hand to Mr. Carty. We find the Employee credible and accept the evidence that he submitted a letter to the Employer by leaving it with another manager known to the Employer. The Employer provided no evidence to dispute this.

44. We note that Mr. Carty wrote to the then Chief Immigration Officer, Lt. Colonel Ivor Walker, on October 2, 2013, indicating that the Employer had suspected the Employee of travelling to St. Vincent and Grenadines while on sick leave and without the Employer's permission. He requested the Immigration Department to confirm whether the Employee had indeed travelled. We believe that Lt. Walker acted on the request, believing that a policy existed and the Employee had infringed it. In our view, Mr. Carty ought to have known that no such policy existed at the time of making the request, but had fashioned his request to persuade the Chief Immigration Officer to provide such information. This action is of grave concern to the Court, as there was no consent by the Employee for him to do so; there was no policy of the Employer requiring the Employee to disclose his travel; the Employee had not committed any crime or being investigated for a crime; he was not subject to any court order; and the request was not information deemed necessary in the interest of the public—all of which may have warranted the information being shared. This is a profound behaviour, perhaps even an illegality and ought to be discouraged in the interest of protecting employees' right to privacy.

45. On the whole, we find the Employee was unfairly dismissed.

Compensation

46. **We award compensation as follows:**

(a) Loss of Protection

The Employee was employed from September 13, 2009, until March 15, 2012, a total of 2.5 years, when he was dismissed. He was paid a monthly salary of \$6,200.00. We award loss of protection, which is equivalent to severance for \$15,500.00 (\$6,200.00 x 2.50)

(b) Notice Pay

The Employee is entitled to receive one month's pay in lieu of notice for \$6,200.00.

(c) Immediate Loss of Earnings

The Employee gave evidence that he did not work due to his injury. Nonetheless, he sought work as a security officer. He sent applications to Blue Waters, Carlisle Bay and a few other hotels. He worked at Blue Waters for one year and earned about \$350.00 per week. At one point, he had to return to Saint Vincent, where he stayed with his sister to make ends meet. He was unable to secure work in Saint Vincent. He was eventually hired as a Prison Officer in 2016, where he earns a basic salary of \$ 2,118.00, a risk allowance of \$350.00, and a shift allowance of \$100.00. Considering the award for

Notice Pay and having little evidence to determine the extent to which the injury prevented the Employee from securing employment, we limit our award of immediate loss to three (3) months of \$18,600.00 (\$6,200.00 x 3)

(d) Exemplary Damages

During cross-examination, the Employer's witnesses acknowledged that the Employee's injuries were severe. Ms. York also accepted that it was harsh and oppressive to treat the Employee as the Employer did, considering that the Employee was on sick leave. Additionally, the Employee was removed from the premises and denied any opportunity to retrieve his personal belongings. We are of the view, separate and apart from the evidence which rendered the dismissal unfair, that the Employer's actions were harsh and oppressive and contrary to the principles of good industrial relations practices. We therefore award the sum of \$7,500.00.

Award

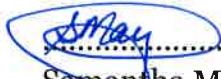
47. The Employee is entitled to compensation in the total sum of \$47,800.00 as follows:

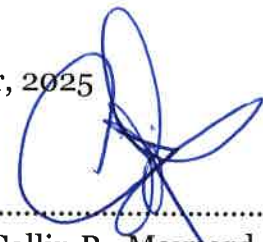
Loss of Protection	\$15,500.00
Notice Pay	\$ 6,200.00
Immediate Loss	\$ 18,600.00
Exemplary Damages	<u>\$ 7,500.00</u>
Total	\$47,800.00

Order

48. The Employer shall pay the Employee the sum of \$47,800.00 on or before November 30, 2025.

Dated the 17th day of October, 2025


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Samantha May- Francis
President


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Collin R. Maynard
Member