

IN THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

REFERENCE NO. 22 of 2015

BETWEEN

NARSHEBAR RICHARDS

Employee

and

PASTRY'S LIMITED t/a EPICUREAN FINE FOODS & PHARMACY

Employer

Before

The Hon. John H.R. Benjamin

Member

The Hon. Judith A. Dublin

Member

Appearances

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

Mr. George Lake of Lake and Kentish, Attorneys-at-Law for the Employer

2017: May 31

2026: May 22

JUDGMENT

Unfair Dismissal- Whether a 'Without Prejudice' endorsement on the Dismissal Letter renders it inadmissible- Whether the Employer carried out a proper investigation having failed to show the Employee video footage on which it relied- The effect if any of the Customer's voluntary offer of his loyalty points to the Employee on the charge of dishonesty- Whether the monetary value of the benefit allegedly obtained \$47.38 renders summary dismissal disproportionate- Whether the inconsistent treatment of the cashiers who participated in the same transactions demonstrated that the dismissal was not genuinely motivated by the grounds relied upon by the Employer.



Background

1. The Employee was employed as a Bag Carrier/Packer from July 29, 2010, at a weekly wage of EC\$360.00. After nearly five years of service, she was summarily dismissed on January 13, 2015, on the ground that she had been dishonest in her use of the Employer's Staff Loyalty Card Programme (the Programme).
2. The Programme awarded loyalty points, redeemable against future purchases, to staff cardholders who made personal purchases at the Employer's supermarket. The rules were set out in the Terms and Conditions for Epicurean Fine Foods & Pharmacy Staff Cards which the Employee signed and acknowledged on April 28, 2011. Points were earned in one way only when the cardholder presented her card at the time of her own purchase transactions. No provision was made for earning points through any other person's transaction.
3. On December 12, 2011, the Employer circulated a general notification to all its employees which the Employee signed and acknowledged. That letter identified that cashiers and bag carriers had been using staff loyalty cards in connection with customer transactions to accumulate points to which they were not entitled. It warned that such conduct was fraudulent and would result in disciplinary action or summary dismissal.
4. In January 2015, the Employer's Cost Controller, Mr. Eustace Ceasar, identified unusual activity on the Employee's account. A review of the Employer's electronic transaction records revealed that between December 10, 2014 and January 7, 2015, points had been credited to the Employee's card on four occasions at times when she was not shopping. The face value of those points was \$47.38.
5. The Employee was called to a meeting on January 9, 2015. She declined representation in writing. When questioned she admitted that on at least one occasion a customer of Spanish appearance had offered her his loyalty points as an alternative tip because he had no change, and that she had the cashier apply those points to her card. She denied any further occurrence.
6. After a further meeting on January 13, 2015, the Employer dismissed the Employee summarily, stating that the company had lost trust and confidence in her ability to carry out her duties with integrity.
7. The decision was communicated by letter dated January 13, 2015. At its head, the letter bore the endorsement 'Without Prejudice'.
8. The Cashier who processed the transactions in question, was also dismissed. Two further cashiers involved in other relevant transactions were not dismissed, as neither was found to have personally received or benefited from any points. However, one subsequently resigned.

The Issues

9. The Employee raised the following issues in support of her claim that she was unfairly dismissed:
 - i. The 'Without Prejudice' endorsement on the Dismissal Letter renders it inadmissible or prevents the Employer from relying upon it.
 - ii. The investigative process was flawed because she was never shown the video footage upon which the Employer relied, and that footage was never produced before this Court.
 - iii. That the customer's voluntary offer of his loyalty points provides a complete explanation to the charge of dishonesty.
 - iv. The monetary value of the benefit obtained EC\$47.38 renders summary dismissal disproportionate.
 - v. The inconsistent treatment of the cashiers who participated in the same transactions demonstrates that the dismissal was not genuinely motivated by the stated grounds.
10. The Employer contends that each of those grounds fails, that the dismissal was for a valid reason, followed a fair procedure, and was a proportionate sanction.

The Statutory Framework

11. Section C56 of the Antigua and Barbuda Labour Code, Cap. 27 ('the Labour Code') provides that every employee who has served beyond the probationary period shall not be dismissed without just cause. Section C58(1)(a) provides that a dismissal shall not be unfair if the reason assigned by the employer relates to misconduct of the employee on the job, within the limitations of Section C59(1). Section C58(2) provides that in measuring whether a dismissal for that reason is fair, the Court shall determine whether the employer acted reasonably in the circumstances. Under Section C59(1), an employer may terminate employment without notice where the employee has been guilty of misconduct in or in relation to employment so serious that the employer cannot reasonably be expected to take any other course. Sections C58(1) and C58(2) are to be read conjointly and they provide that it is not enough that misconduct exists; the employer must also have acted reasonably in all the circumstances as have been applied in the Court of Appeal decision of **Cable and Wireless (Antigua and Barbuda) Limited v Antigua and Barbuda Workers' Union, ANULTAP2016/003**.
12. The Court therefore considered, firstly, whether the reason assigned by the Employer was one that related to misconduct on the job within the meaning of Section C58(1)(a). Secondly, whether the Employee's misconduct was of sufficient gravity to satisfy the threshold in Section C59(1) in that it was so serious that the

Employer could not reasonably be expected to take any other course. Thirdly, having regard to all the circumstances, whether the Employer acted reasonably within the meaning of Section C58(2).

13. The burden lies on the Employer to establish, on a balance of probabilities, that the dismissal was not unfair. This Court has adopted the approach in **British Home Stores Ltd v Burchell [1980] ICR 303** as a guide to the assessment of misconduct under the first and third limbs of the test- the employer must have genuinely believed the employee to be guilty of the misconduct, on reasonable grounds, having carried out as much investigation as was reasonable in the circumstances. It is not the function of this Court to substitute its own view of the employee's guilt or innocence for that of the employer; the question is whether the employer's belief and the process by which it was formed were reasonable.

Analysis

The 'Without Prejudice' Endorsement

14. The 'Without Prejudice' rule as this Court understands it is a rule of evidence grounded in public policy. Its purpose is to encourage settlement by protecting genuine negotiating communications from disclosure in subsequent proceedings as stated by Lord Griffiths in **Rush & Tompkins Ltd v Greater London Council [1989] AC**. The rule attaches to the nature of the communication, not its label. As Lindley LJ stated in **Walker v Wilsher (1889) 23 QBD 335** the words 'Without Prejudice' mean that the communication is not to prejudice the position of its maker if the terms proposed are not accepted. The rule protects settlement proposals; it does not protect every document to which the words happen to be appended.
15. In the case of **Meaker v Cyxtera Technology [2023] EAT 17**, the employee Mr. Meaker, was a manual worker who had sustained permanent back injuries. His employer determined that he could no longer perform his duties. The employer issued a dismissal letter dated February 4, 2020, headed 'Without Prejudice'. The dismissal letter stated that Mr. Meaker's employment was being ending by 'mutual agreement' on February 7, 2020. Mr. Meaker rejected the settlement and sued for unfair dismissal. The Employment Appeal Tribunal's approach was to slice and dice the dismissal letter in two parts and determined that the part of the letter which communicated his effective date of dismissal was not a privilege, but the part which made an offer for extra money to settle remained 'Without Prejudice'.
16. The Court determined that the "Without Prejudice" label could not hide that this was a dismissal letter in which an effective date of dismissal had been communicated.
17. Having considered the contents of the letter and the fact this letter was mutually accepted as the dismissal letter; the Court is of the view that the 'Without Prejudice'

endorsement on the letter is therefore of no legal effect. The Dismissal Letter is therefore admissible in evidence and both parties may rely upon it fully.

The Video Evidence

18. The Employee contends that the investigative process was unfair because she was never shown the video footage upon which the Employer relied during the disciplinary meetings, and that footage was never produced before this Court.
19. The dismissal letter expressly states that the Employee engaged in four transactions which were found to be fraudulently obtained. The dismissal was therefore framed around four incidents, not one. The Employee admitted one and denied three. In respect of the three she denied, the Employer relied on video footage that she was never shown and that was never produced before this Court.
20. The procedural deficiency advanced by the Employee is real and the Court does not minimise it. In **Spink v Express Foods Ltd [1990] IRLR 320**, the Employment Appeal Tribunal was considering the dismissal of an employee who had not been shown the evidence on which the employer relied at the disciplinary stage. Wood J articulated the governing principle in terms that apply directly here opined that it is a fundamental part of a fair disciplinary procedure that an employee knows the case against her; fairness requires that she be told the important parts of the evidence in support of that case and be given an opportunity to criticise or dispute it and to adduce her own evidence. That standard was not met in respect of the three disputed incidents in this case. In respect of the three disputed incidents, the Court draws an adverse inference from the non-production of the footage.
21. However, this procedural finding does not determine the outcome of the claim. The admitted incident involving the Spanish customer stands independently and was established by the Employee's own evidence under oath. It constitutes a deliberate breach of the Terms and Conditions and of the December 2011 warning by an employee who knew precisely what was required of her. The Court is satisfied that this single admitted incident, viewed in light of the prior written warning that dismissal would follow, did not disadvantage the Employee and was of itself sufficient to satisfy the threshold in Section C59(1) of the Labour Code being misconduct so serious that the Employer could not reasonably be expected to take any other course. Where the substantive reason for a dismissal is established independently of procedurally deficient evidence, that procedural failing does not render the dismissal unfair overall. The overall assessment under Section C58(2) is that the Employer acted reasonably in dismissing the Employee for admitted conduct of this gravity, notwithstanding its procedural failings in respect of the disputed incidents.

22. This analysis in the Court view also bears on the application of the Burchell test. The Employer's genuine belief in the one admitted incident was beyond question since the Employee confirmed it herself under oath. The Burchell test is therefore satisfied in respect of the admitted incident, and that is sufficient to establish the valid reason for dismissal. The Employee's argument there fails.

The Customer's Voluntary Offer

23. This is the most substantive argument advanced on behalf of the Employee. Her position is that there was no dishonesty because the customer gave her the points of his own free will. She did not take what was not given. She accepted a gift.
24. The Court notes at the outset an evidential constraint in that neither party presented before the Court any record of the terms and conditions of the Customer Points Programme. What the customer's own loyalty programme permitted or prohibited him to do with his points is therefore a question this Court cannot answer, and the analysis proceeds strictly on the basis of what the evidence establishes about the Employee's own obligations.
25. The Terms and Conditions which governed the Employee created a single mechanism for earning points, that is, as a cardholder, the Employee was authorized to present her card at the time of her own personal purchase. Nothing more and nothing else. The December 2011 warning letter then made the particular prohibition explicit that passing a staff loyalty card through a customer's transaction was conduct characterised as fraudulent and for which dismissal would follow. The Employee signed both documents and acknowledged both. The obligations they imposed upon her were clear.
26. Moreover, the employment contract is a matter between the Employee and the Employer. A customer, however well-intentioned, is not a party to that contract and has no authority to waive or modify its terms on the Employer's behalf. Whatever the customer wished to do with his accumulated points, the terms of the staff loyalty programme did not permit the Employee to receive them through the Customer's transaction. The Customer's generosity cannot create a permission that the Employee's contract with her Employer did not contain.
27. This principle is illustrated by the decision of this Court in **Lewis v Courts (Antigua and Barbuda) Ltd, Industrial Court Reference No. 13 of 1997**, in which a dismissal was found unfair in part because the employer's policy had never been communicated to the employee. In that case, the employee could not be bound by rules she did not know. The position here stands in direct contrast to the **Lewis Case** in that the relevant obligations were communicated twice in writing and the Employee acknowledged them both times. She cannot claim the benefit of an ignorance she does not possess.

28. It is the Court's view that the Employee's own evidence settles the matter. Her defence that the customer offered the points does not defeat the charge. The Terms and Conditions did not create an exception for customer-offered points. They imposed an unconditional restriction that points were earned through the Employee's own personal purchases, and through no other means. The customer's willingness to transfer his points is legally irrelevant to the obligations the Employee had undertaken. This contention also fails

Monetary Value and Proportionality

29. The Employee submits that the dismissal was disproportionate having regard to the modest face value of \$47.38 being the points obtained in comparison to her length of service of nearly five years. The Court gives these matters their proper weight. Length of service and the financial value of any benefit obtained are always relevant considerations in the assessment of reasonableness under Section C58(2) of the Labour Code and are not to be set aside without examination.
30. However, the question posed by Section C59(1) of the Labour Code is qualitative, not quantitative. Section 59 (1) requires the Court to assess whether the misconduct was so serious that the Employer could not reasonably be expected to take any other course. That question is answered by examining the nature of the conduct, not its financial value. The Employee's conduct was deliberate. The Employee knowingly passed her card to the cashier for use in another person's transaction. It was committed in direct defiance of an explicit written warning, the consequences of which the Employee had acknowledged by her own signature. When confronted, she advanced a defence that her own evidence contradicted. These are the features that define the gravity of the breach of trust. The gravity of misconduct is assessed by its nature and its impact on the employment relationship, not by the financial quantum of the benefit obtained. This ground also fails.

Inconsistency of Treatment

31. The Employee contends that the failure to dismiss two of the cashiers who participated in the same transactions demonstrates an inconsistency that undermines the reasonableness of the dismissal under Section C58(2) of the Labour Code.
32. The question under Section C58(2) is not whether others who participated in the misconduct escaped discipline. It is whether the Employer acted reasonably in dismissing this Employee for this conduct. The governing principle on inconsistency of treatment was articulated by Waterhouse J. in **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352**, a case in which an employee alleged that she had been treated more harshly than a colleague for similar conduct. The Court held that evidence of differential treatment of another employee in apparently similar

circumstances may be relevant in limited ways, for example, where employees have been led to believe that certain conduct will be overlooked, or where the disparity suggests that the stated reason is not the real reason for the dismissal, or where the circumstances are truly parallel such that the difference in treatment supports an argument that dismissal was not within the range of reasonable responses.

33. However, *Waterhouse J.* was clear that these are limited circumstances and that the emphasis in the statutory test is upon the particular circumstances of the individual employee's case. Where it was reasonable for the employer to dismiss the employee before the Court, the mere fact that another employee involved in the same events was treated more leniently is not determinative.
34. Applying that principle here, in the Court's view, the Employee and the cashiers were not in truly parallel circumstances. The Employee was the cardholder, the direct beneficiary of the misuse of the Programme, and the person who had signed both the Terms and Conditions and the December 2011 warning. The Cashiers occupied a materially different position as facilitators who apparently did not personally receive any benefit. This Court is satisfied that the Employer acted reasonably in dismissing the Employee for her own admitted conduct, and the allegations of differential treatment of the cashiers does not displace that conclusion. The Court further observes that the cashiers' conduct, forming part of the same scheme but being a distinct form of misconduct, required its own separate, independent investigation and disciplinary assessment and was not before this Court for consideration. The Employee's contention therefore fails.

Conclusion

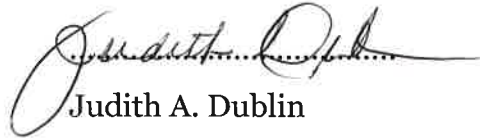
28. Each of the five bases advanced by the Employee in support of her claim for unfair dismissal has been considered and rejected. Applying the statutory test under Sections C58(1)(a), C58(2) and C59(1) of the Labour Code the Court has determined the reason assigned by the Employer for the Employee's dismissal that the Employee dishonestly misused her Staff Loyalty Card relates to misconduct on the job within Section C58(1)(a). That reason is established on the Employee's own admissions under oath, which satisfy the **Burchell** test as applied in this jurisdiction. The Court finds that the Employer genuinely believed the Employee's guilt of the misconduct on reasonable grounds, following a reasonable investigation.
29. The admitted conduct and the Employee's deliberate acceptance of loyalty points through a customer's transaction in knowing breach of the Terms and Conditions and an explicit written warning was misconduct so serious that the Employer could not reasonably be expected to take any other course than termination within Section C59(1).

30. Having regard to all the circumstances, the Employer acted reasonably within Section C58(2). The Employee was informed of the allegations, given a full opportunity to respond, offered representation which she declined in writing, and provided with written reasons for her dismissal. The procedure was fair. The sanction was proportionate to the gravity of the breach of trust. The differential treatment of the cashiers rested on a principled distinction which the Court accepts.
31. The Court accordingly finds that the dismissal of the Employee on January 13, 2015, was not unfair within the meaning of Section C56 of the Antigua and Barbuda Labour Code. The Employee's Reference is thereby dismissed.

Dated the 22nd day of May, 2026



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John H.R. Benjamin



Judith A. Dublin



The Hon. John H.R. Benjamin delivered this Judgment