

IN THE INDUSTRIAL COURT

ANTIGUA AND BARBUDA

REFERENCE NO. 30 of 2019

BETWEEN

RENATA BENJAMIN

Employee

and

ALEX GRIMLEY T/A SHEER ROCKS RESTAURANT AND BAR

Employer

Before:

The Hon. Samantha May-Francis

President

The Hon. Collin R. Maynard

Member

The Hon. Alando Michael

Member

Appearances:

Mr. Anderson Carty of The Antigua & Barbuda Tradesman & United Workers Federation,
Representatives for the Employee

Ms. Jan Peltier Attorney at Law of Christopher and Associates, Representatives of the
Employer.

2026: May 14
May 29

JUDGEMENT

Unfair Dismissal; Misconduct- alleged theft of tips; Procedural Fairness; Adequacy of Disclosure; Natural Justice; Factual Basis for Dismissal- Sections C56, C58, C59, C10, C11 Labour Code Cap. 27; Unlawful Suspension- maximum suspension period exceeded- wages withheld during suspension; Compensation if any

Introduction

1. The Employee was employed as a Waitress, and later as Hostess and Cashier, from November 12, 2014. She last earned \$11.39 per hour, working eight hours per day over a five-day week. In addition to her basic wage, she earned an average service charge of \$650.00 and average pooled tips of \$800.00 per fortnight, which resulted in a total remuneration package of approximately \$2,361.20 per fortnight.



2. A Collective Bargaining Agreement between the Employer and the Antigua & Barbuda Workers' Union covered her position.
3. During her employment, over ten members of staff participated in a savings arrangement known as a 'Box', operated by then General Manager Mr. Charles Bachelor. This arrangement involved the regular and open exchange of monies among colleagues while at work.
4. On March 23, 2018, the Employee was suspended with pay pending an investigation into alleged theft of tips. By letter dated March 27, 2018 she was provided with a preliminary report and invited to submit a written response, which she did on April 9, 2018. By letter dated April 16, 2018 the suspension was extended to April 28, 2018. The Employee reviewed the video footage which allegedly showed money being exchanged between Mr. Charles Bachelor and her on April 18, 2018.
5. A formal disciplinary hearing was held on April 25, 2018, at which the Employee was represented by an Attorney-at-Law. On April 28, 2018, the Employee was notified of her dismissal by WhatsApp message. She collected the formal Dismissal Letter on May 5, 2018.

Preliminary Application

6. At the beginning of the trial, Mr. Carty applied for the matter to proceed ex parte, on the grounds that the Employer had filed no witness statement and had not effected proper service of its Memorandum of Defence on the Employee. Mr. Carty further submitted that the Employer's participation if granted should be confined to the assessment of compensation, liability being established by default. Learned Counsel Ms. Peltier, now appearing for the Employer, submitted that there had been no willful non-compliance and that potential witnesses were no longer with the establishment, hence the absence of witness evidence.
7. The Court declined Mr. Carty's application holding that the Employer was entitled to a full defence. However, the Court made clear that in the absence of any sworn evidence from the Employer, its Memorandum of Defence was a pleading only and its contents could not be treated as proof of the facts asserted.
8. Mr. Carty, further submitted that the Memorandum of Defence was served on him via email sometime in September 2021. Upon receiving the Memorandum of Defence from the Employee's previous Attorney, he had informed the then Attorney that he was unable to accept service of the Memorandum by electronic means. Learned Counsel for the Employer, Ms. Jan Peltier also indicated that she was hearing about Mr. Carty's non-acceptance of service for the first time.
9. On the service issue, the Court held that Mr. Carty had knowledge of the Memorandum and was not prejudiced in a way that warranted exclusion. The Court offered an adjournment if Mr. Carty felt at a disadvantage as he indicated that he had not engaged with the Defence; he elected to proceed.

The Applicable Law

10. Section C56 of the Antigua and Barbuda Labour Code Cap. 27 (the ‘Labour Code’) provides that every employee whose probationary period has ended shall have the right not to be unfairly dismissed, and that no employer shall dismiss any such employee without just cause.
11. Section C58(1) 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) and (2), provided there is a factual basis for the assigned reason. Section C58(2) provides that the general test for deciding whether a dismissal was unfair is whether, under the circumstances, the employer acted reasonably; but even if the employer acted reasonably, if it was mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence. Sections C58(1) and (2) must be read conjunctively.
12. Section C59(1) provides that an employer may terminate the employment of an employee 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 course other than termination. Section C59(2) provides that such termination may be effected without advance notice. Section C10(1) requires the employer to furnish a written statement of the precise reason for termination within seven days of termination or notice thereof. Section C10(3) provides that the employer is conclusively bound by the contents of that statement in any proceedings testing the fairness of the dismissal. Section C11 of the Labour Code prescribes a maximum period of suspension of four weeks pending investigation.
13. The applicable test, as confirmed by the Privy Council in **Blackburn v LIAT (1974) Ltd [2020] UKPC 9** and drawing on **British Home Stores Ltd v Burchell [1980] ICR 303**, requires the Court to determine: (a) whether the Employer held a genuine belief that the Employee committed the misconduct alleged; (b) whether the Employer had reasonable grounds for that belief; (c) whether the Employer carried out as much investigation as was reasonable in the circumstances before forming that belief; and (d) whether the procedure followed gave the Employee a genuine opportunity to answer the full case against her.
14. It is not the function of this Court to determine whether the Employee committed the act of misconduct alleged. Its function is to assess the reasonableness of the Employer’s conduct in the dismissal and the fairness of the process by which it was arrived at.

The Evidence

15. The sole witness at trial was the Employee. Her Witness Statement was admitted without objection and confirmed as true and correct. The Employer did not call any witnesses, filed no witness statement, and produced no documents at trial. Ms. Peltier made submissions on behalf of the Employer but led no evidence. The Court observes that perhaps through no fault of hers, Ms. Peltier was unable to undermine the Employee’s evidence in any meaningful way, having regard to the fact that the Employer failed to file witness statements or produce any documentary evidence in support of its defence.

16. Ms. Benjamin the Employee, testified that at the meeting of March 23, 2018, she was told she was under suspicion for theft of tips but was not given the specific amount alleged, the date or dates of any alleged theft, the identity of the mystery diners, or any other particulars. She received a preliminary report in early April 2018 which, on her evidence, told her the investigation had concluded she had stolen cash tips before she had been heard. That report was not produced before this Court by either party and the Court cannot independently verify its contents.
17. Ms. Benjamin submitted a written response on April 9, 2018, in which she denied receiving any cash tip from a customer March 19, 2018, stating the bill was settled by credit card. She was permitted to review the video footage on April 18, 2018, which according to the witness showed the then General Manager Mr. Charles Bachelor standing next to her; no exchange of money was visible. She attended the disciplinary hearing on April 25, 2018, with legal representation through former Learned Counsel Mr. Ralph Francis, now deceased. She was initially notified of her dismissal by WhatsApp on April 28, 2018, and collected the actual Dismissal Letter on May 5, 2018
18. As to mitigation, Ms. Benjamin found employment in June 2018 approximately two months after dismissal initially as a Cashier earning \$21.00 per hour. She currently holds the position of Quality Analyst and earns \$32.00 per hour. Both hourly rates of pay exceed her Sheer Rocks hourly rate of \$11.39.
19. Under cross-examination by Ms. Peltier, the Employee confirmed she was not given copies of the mystery diners' statements, she was not told the amount that it was alleged she had stolen, did not receive pay for the period 24th to 28th April 2018, and collected the Dismissal Letter on May 5, 2018. Her evidence was not shaken in cross-examination on any of the matters relevant to the Court's findings.

Findings

Suspension

20. The Employee was unfairly suspended. Section C11 of the Labour Code prescribes a maximum suspension period of four weeks. The Employee was suspended from March 23, 2018 to April 28 2018, a period in excess of five weeks. The suspension beyond four weeks was unlawful. In addition, the Employee's unchallenged evidence is that she was not paid wages for the period 24th to 28th April 2018.

Unfair Dismissal

21. The Court applies the test in sections C58(1) and C58(2) of the Labour Code and the principles in **British Home Stores Ltd v Burchell [1980] ICR 303 as adopted in Blackburn v LIAT (1974) Ltd [2020] UKPC 9**. The question is not whether the Employee stole cash tips. That is not within the jurisdiction of this Court. The question is whether the Employer acted reasonably in dismissing the Employee for the reason assigned, and whether it followed a fair procedure that gave the Employee a genuine opportunity to answer the full case against her.

22. The Court acknowledges that the Employer followed a recognisable disciplinary process. It suspended the Employee with pay, provided a preliminary report, invited and received her written response, offered a video footage review, and held a formal hearing at which she was legally represented. The Dismissal Letter records her participation and responses during the hearing. In the Court's view there is not sufficient evidence of predetermination on the part of the Employer. The Court finds that the Employer reached its conclusion after going through a process.
23. However, the Court notes that the process was procedurally defective in the following specific respects. Firstly, the mystery diners' statements were not disclosed. The Dismissal Letter dated April 28, 2018, relies centrally on mystery diner reports. The Employee gave unchallenged evidence that she was never given these statements and was not told the amount, date or identity of the diners.
24. Secondly, the Dismissal Letter relies on a statement by another employee Ms. Karen Morson attributing damaging words to the Employee. The Employee gave unchallenged evidence that this statement was never shown to her and that Ms. Morson was not present at the hearing in the manner alleged.
25. Thirdly, the Dismissal Letter relies on an analysis of the tip collection rates comparing the Employee's shifts with the suspension period. The Employee gave evidence that this analysis was not provided to her before the hearing of April 25, 2018, the Employer did not challenge her on this in cross-examination, and no document was produced showing prior disclosure.
26. Fourthly, the Employee was not told the specific amount alleged, the dates when the alleged theft occurred, or the identity of complainants. In cross-examination the Employer put to her whether being told she was under suspicion was sufficient. That challenge cannot be considered in isolation from the broader disclosure failures identified above. By the time of the disciplinary hearing, Employee had not been given adequate disclosure to meaningfully answer the full case against her.
27. The Court finds that on the evidence before it being solely, the Employee's sworn testimony and the documents tendered into evidence, no factual basis for the allegation of theft has been established before this Court. The Employer's Memorandum of Defence describes evidence said to have been gathered during the Employer's investigation but that evidence was not produced before the Court in an admissible form. The Court reiterates that it cannot make findings of fact on the basis of matters averred to in the Employer's pleadings alone. The Court however does not find and it is not the function of the Court to find that the Employer had no basis whatsoever for his belief at the time of dismissal. What the Court finds is that the Employer has not discharged his evidential burden before this Court to demonstrate a factual basis for the assigned reason.
28. In any event, the cumulative effect of those defects rendered the dismissal unfair in the circumstances of this case. This finding is confined to the specific disclosure failures identified above. It does not reflect a finding that the Employer acted in bad faith or that its process was a sham. The unfairness lies in its failure

to give the Employee adequate disclosure of the evidence relied upon against her, so that she could meaningfully answer the full case before a decision was made.

29. The dismissal therefore fails both the factual basis requirement under Section C58(1) and the reasonableness and procedural fairness requirements under Section C58(2).

Compensation

30. The Collective Bargaining Agreement was however not produced as evidence. The Employer in its Memorandum agreed to the Employee's hourly rate. The Employer made no specific challenge in its Memorandum to the rates used by the Employee in calculating Loss of Protection and vacation. In the absence of the Collective Bargaining Agreement and any objection to the rates, the Court has utilized the rates as advanced by the Employee.

Loss of Protection

31. The Employee worked from November 2014 to May 2018 a total of forty-two months. Loss of protection is calculated at one day's basic wage per completed month of service. The Employee is therefore entitled to loss of protection in the sum of **\$3,827.04** (42 days x \$91.12)

Outstanding Vacation

32. The Employee claims that she is entitled to accrued vacation for the period November 2017 to May 2018. The Employee claimed the sum \$1,093.44. The Employer produced no vacation records. The burden of maintaining such records lies with the Employer. The claim is accepted as presented and she is awarded the sum of **\$1,093.44**.

Notice Pay

33. The Employee was paid on a bi-weekly basis earning \$11.39 per hour or \$91.12 per day. The Employee's evidence of her average tips of \$800.00 and service charge of \$650.00 per fortnight was not challenged; the Court accepts the evidence of the Employee. The Employee is therefore awarded in the sum of **\$2,361.20** (\$911.20 + \$800.00 + 650.00)

Reimbursement of Sick Pay

34. The deduction of \$546.72 from the Employee's final pay on account of alleged excess sick days remained unexplained. The Employer produced no contractual or statutory authority to justify the deduction. The Employee is entitled to be reimbursed in the sum of **\$546.72**.

Unlawful Suspension

35. The Court having found that the suspension was unlawful, the Employee is entitled to wages for the unlawful period. By letter dated April 16, 2018, the Employer formally extended the suspension to April 28, 2018. That extension took the total period of suspension from March 23 to April 28, 2018, a period of five weeks and two days in excess of the four-week statutory maximum prescribed by Section C11 of the Labour Code. The extension beyond four weeks was therefore unlawful. In addition, the Employee's unchallenged evidence is that she

was not paid wages for the period April 24 to April 28, 2018, notwithstanding that the suspension was ostensibly with pay. The Court awards compensation calculated from April 9, 2018, being the date on which the Employee filed her written response and the Employer was therefore in possession of all material necessary to proceed to a hearing, to April 28, 2018, a total of fifteen working days. This reflects both the period during which the continued suspension served no further investigative purpose and the period for which wages were withheld contrary to the terms of the suspension in the sum of \$1,366.80 (15 x 91.12) plus average tips and service charge in the sum of \$2,175.00 (\$145.00 daily x 15) in the total sum of **\$3,541.80**.

Immediate Loss

36. The Employee gave evidence that she secured employment approximately two months after her dismissal. The Court accepts the unchallenged evidence of the Employee that she earned approximately \$2,361.20 per fortnight at Sheer Rocks, taking into account her base wages, average service charge and average pooled tips, which is equivalent to approximately \$5,115.93 per month. The Employee found employment at Canada Place in June 2018, initially as a Cashier earning \$21.00 per hour, equivalent to approximately \$3,640.00 per month. She was subsequently promoted to Quality Analyst at \$32.00 per hour. The date on which that promotion took effect was not established in evidence. The Court therefore awards the sum of \$10,231.86 representing two months' immediate loss at the full Sheer Rocks equivalent rate, being the period prior to the Employee securing alternative employment. The Court further awards the assessed sum of \$5,903.72, representing four months at the differential of \$1,475.93 per month between the Employee's Sheer Rocks earnings and her initial earnings at Canada Place. The total immediate loss award covers a period of six months and amounts to \$16,135.58. The Employee is awarded the total sum of **\$16,135.58**.

Manner of Dismissal

37. The Court declines to make a separate award for manner of dismissal. There is no evidence of predetermination that the Employee had stolen. The Employer attempted to follow a recognizable procedure and reached its conclusion through that process although flawed. It is noted that the process did not involve the criminal authorities.

Exemplary Damages

38. The Court declines to award exemplary damages. The threshold requires conduct in the dismissal itself that is calculated, arbitrary or oppressive to a degree that ordinary compensation is insufficient or breach of good industrial relation practices. The Employer genuinely investigated, followed a recognisable process, and reached a conclusion through it. There is no evidence of predetermination of finding of theft or dismissal. The identified failings of the Employer go to the adequacy of the disclosure and the procedural flaws. While they are sufficient to render the dismissal unfair, they do not amount to conduct goes to the fundamental character of the dismissal itself.

Costs

39. No order as to costs.

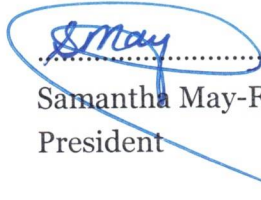
40. The Employee is therefore entitled to compensation as follows:

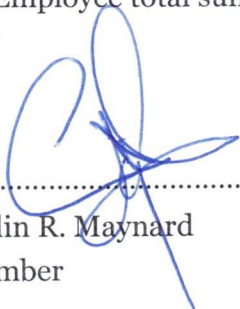
Loss of Protection	\$ 3,827.04
Outstanding Vacation	\$ 1,093.44
Notice Pay	\$ 2,361.20
Unlawful Suspension	\$ 3,541.80
Reimbursement of Sick Pay Deduction	\$ 546.72
Immediate Loss	\$ <u>16,135.58</u>
Total	\$ <u>27,505.78</u>

ORDER

41. For the reasons set out above the Court makes the following Order:

1. The Employee is entitled to compensation in the sum of **\$27,505.78** as and for her unfair dismissal.
2. The Employer shall pay to the Employee total sum of **\$27,505.78** on or before the 1st day of July, 2026.


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Samantha May-Francis
President


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Collin R. Maynard
Member


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Alando Michael
Member

Delivered by the Hon. Alando Michael