SUPPLEMENT TO

ANTIGUA AND BARBUDA

OFFICIAL GAZETTE

OF THURSDAY 29th August, 2019

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INDUSTRIAL

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JUDGMENTS

THE ANTIGUA AND BARBUDA OFFICIAL GAZETTE

SUPPLEMENTARY

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NOTICES

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 9 OF 2015

BETWEEN

ALBERT GEORGE

Employee

And

CORTSLAND HOTEL

Employer

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. Judith Dublin — Member

Appearances:
Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee
Dr. L. Errol Cort of Cort and Cort, Attorneys-at-Law for the Employer

2016: November 24
2019: August 16

JUDGMENT

Brown, P;

Background

1. The Employee commenced his employment with the Employer, a small family operated hotel, in 1986 when he was 39 years old. His duties included those of a general construction worker, a gardener, a porter, a pool deck cleaner and other duties involving manual work.

2. By letter dated 20th June, 2014, when the Employee was over 64 years old the Employer formally notified him that it was dissatisfied with his work performance. Prior to receiving the letter the Employer had on several occasions orally complained to the Employee about his unsatisfactory performance.

3. By letter dated 19th September, 2014, when the Employee was less than one month from his 66th birthday the Employer wrote to him notifying him of the termination of his employment with effect from 28th September, 2014 on the grounds of his unsatisfactory performance and misconduct.

4. By letter dated 25th September, 2014 the Employer retracted its said letter of termination as a result of which the Employee continued in his employment in the usual manner up to 26th September, 2014.

5. By letter dated 26th September, 2014 the Employer informed the Employee that he would be placed on retirement from 6th October, 2014. The retirement of the employee was to take effect when he was 5 days away from his 66th birthday. We reproduce that letter as follows:

> ***"26th September, 2014***
>
> ***Mr. Albert George***
>
> ***Dear Mr. Albert George,***
>
> ***Given that you have passed the age at which your social security pension commenced and having regard to the natural decline overtime of your ability to carry out the magnitude of strenuous manual labour that effective performance of your employment duties requires, we hereby inform you that you will be placed on retirement as of Monday 6th October, 2014. Your last working day will therefore be Friday 3rd October, 2014.***
>
> ***Your vacation entitlement will be calculated and paid to you accordingly.***
>
> ***Thank you for your service, and best wishes on your retirement.***
>
> ***Yours truly,***
> ***Juanita Cort***
> ***Proprietor"***

The Opposing Cases

6. On the one hand, by its Memorandum of Claim filed on 23rd March, 2015 the Employee:
   (a) referred to the said letters dated 20th June, 2014, 19th September, 2014, 25th September, 2014 and 26th September, 2014; and

   (b) asserted that it was not aware that the Employer had a retirement age policy and contended that "having regard to the law, natural justice and the tenets of good industrial relations practices, the Employer's action amounts to (an) unfair dismissal.

7. On the other hand, by its Memorandum of Defence filed 24th April, 2015 the Employer maintained that its decision to terminate the services of the Employee was made in light of:

   (a) his attainment of pensionable age of 60 years over 5 years earlier on 11th October, 2008;

   (b) "particularly having regard to the age, physical incapacity, demanding nature and magnitude of the prescribed manual work and the inability of the Employee to perform or adequately perform his tasks, the Employer decided to officially retire the Employee"

   (c) "the Employee was aware that the Social Security pensionable age of 60 years is and was the official retirement age as applied by the Employer; and

   (d) the Employer's mandatory retirement age is 65 years and any employee working beyond that age did so on a month to month or week to week basis provided that he is physically and mentally able to perform his duties satisfactorily.

8. In the circumstances, the Employer denied that the Employee was unfairly dismissed and urged the Court to dismiss his claim.

The Main Issues

9. The main issues arising for our determination are as follows:

(1) Whether the Employee was unfairly dismissed?
(2) Whether the Employee was given adequate notice of his imposed retirement?

Issues No. 1: Unfair Dismissal?

10. We accept that the Employer wholly retracted its termination letter three days before the dismissal was due to take effect. In our opinion, as a result of the retraction, the grounds of unsatisfactory performance and misconduct as good causes for the dismissal as set out in the warning letter were no longer being pursued by the Employer. And the "Employee continued his employment with the Employer without any break in his term of employment."

11. Thus, it is not necessary for us to consider and determine: whether there was a sound factual basis for the assigned reason for the dismissal of the Employee and whether the Employer acted reasonably in the circumstances.

Issue No. 2: Reasonable Notice of Retirement

12. In his submissions on behalf of the Employee, Mr. Carty submitted that the outcome of the Employer's Claim turns on unfair dismissal and not retirement. In that regard he referred to the judgment of the Court of Appeal in **Civil Court of Appeal No. 12 of 2002 E Alex Benjamin Limited v. St. Lawrence Defreitas** where at paragraph 1, Saunders J.A. summarized "some novel and interesting legal issues" to be concerned with "the right of an employer to institute a retirement age policy and the consequences for employees should there be a unilateral implementation of such a policy."

13. Notwithstanding the precise choice of words, it is clear to us that what the Employer did in the matter before us was tantamount to the unilateral implementation of such a policy. In fact, at paragraphs 20 and 22 of its Memorandum, the Employer averred that "the Employer decided to officially retire the Employee." and that the "Employee was retired with effect from 3rd October, 2014."

14. Moreover, at paragraph 23 of its Memorandum, the Employer also stated that "the Employee was aware that the Social Security pensionable age of 60 years is and was the official retirement age as applied by the Employer. Further, the Employer asserted that its "mandatory retirement age is 65."

15. Based on the foregoing pleadings it is clear that the Employer grounded its position on the existence of a retirement age policy or practice. In other words, the Employer's position is that it was merely implementing a preexisting policy or practice.

16. On the premise that the Employer effected the dismissal pursuant to its subsisting retirement age policy or practice, we are mindful that at paragraph 13 and 14 of its judgment, the Court of Appeal found it to be "unfortunate" that "the Industrial Court treated the case as an ordinary case of unfair dismissal". We are guided by that dictum and will refrain from that treatment in the instant case. Instead, acknowledging that the implementation of a retirement policy "is neither unreasonable nor unfair" we will direct our attention to the adequacy or inadequacy of the notice to the Employee of the existence of the policy/practice and its the implementation or introduction.

17. In our view, the Employer having invoked retirement as the basis for the termination of the Employee's services, we are obliged to shift our focus away from the usual consideration of good cause for and the reasonableness of the dismissal. To do otherwise would be to run afoul of the approach clearly delimited by the Court of Appeal.

18. It is noteworthy that the Employer by its pleadings and related evidence sought to justify its dismissal of the Employee on the ground that "it was clear that he was no longer capable of performing the functions for which he had been

hired". Be that as it may, we are of the opinion that the overriding consideration should be the adequacy of the notice of retirement.

19. In his closing submissions on behalf of the Employer Dr. Cort firstly emphasized the Employer's view that the Employee's work performance had deteriorated to the point where he was no longer capable of adequately performing his duties. Interestingly having done so, and having laid the foundation of retirement as the basis for the dismissal, learned Counsel took a U-turn and sought to justify the dismissal as it would have done in "an ordinary case of unfair dismissal. This U-turn, in our view, is untenable.

20. In the circumstances, we focus on what we consider to be learned Counsel's most pertinent submissions under this heading "Common Law Application". In that regard we think it is pivotal to determine whether the Employee's performance had deteriorated as a result of age or any other reason. We are obliged to focus on the adequacy of the notice of retirement.

21. We are mindful of the reminder given by Singh JA in **Civil Appeal No 1 of 1993 Julie Saunders et al v St. Kitts Sugar Manufacturing Corporation**, case that "each case will have to be determined having regard to its own circumstance". Having noted that, we have carefully considered the several authorities submitted by Dr. Cort and find them to be largely distinguishable from the case now before us.

22. In his judgment in the **Julie Saunders case**, Singh JA considered whether "six months' notice was reasonable notice given the circumstances in that case." In his view, the Court should consider several factors including the employee's qualifications, the length or duration of his employment, the responsibilities he had and the reasonable length of time it would take for him to obtain alternative employment

23. In that case, the deceased, on whose behalf these claim was pursued, was 56 years old and had given 34 years of service. In the end, having asserted that the issue of reasonable notice was a matter of law, he concluded that: "Having regard to the age, expertise, length of service and other qualities of this appellant already mentioned, I am of the firm opinion that reasonable notice in these circumstances should be ten months".

24. In the **DeFreitas case** Saunders JA cited the Canadian case of Brown v Coles (1986) 5 BCLR (2d) 143 for the express purpose of noting the approach taken by the British Columbia Court. The focus of that Court was the reasonableness of the length of notice. The learned Justice of Appeal adopted that approach. In the end, he was guided by the Industrial Court's view that "at least 12 months' notice should have been given". Ultimately, Saunders JA concluded that:

> "In light of Mr. De Freitas age and the fact that he had, in his words, given in excess of service nine years loyal and efficient service to the company, I would agree that twelve months' notice would have been appropriate".

25. In the present case the Employee had given 28 years of service. His perceived lower station in life was wholly counterbalanced by his long tenure. Moreover, as to his knowledge of the Employer's policy or practice regarding retirement, we accept the Employee's evidence that neither at the commencement of his employment nor at any subsequent date was he informed of the existence or introduction of any such policy. Accordingly, we conclude that his retirement was imposed and find that he had no notice of the Employer requirement for him to retire with effect from 06th October, 2014 when he was almost 66 years old.

26. Given the circumstances, the principles and practices of good industrial relations should leave no doubt that it was desirable for the parties to mutually agree the date and other terms of the Employee's retirement. In our opinion, the employee's expectation of a "golden handshake" was not unreasonable.

27. In the absence of agreement, we will determine reasonable notice with particular reference to the Employee's long tenure, the wide range of his duties, his age and the likelihood of finding similar employment after his imposed retirement.

28. At this point, we find it convenient to remind ourselves of our mandate under Section 10 (3) of the Industrial Court Act, which provides:

"(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –

(a) make such order or award in relation to a dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole;

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code."

29. Having regard to all the circumstances and our mandate under Section 10 (3) of the Act, we are of the opinion that a period of at least 12 months would have been reasonable notice of to the Employee of his retirement.

The Award

30. In the premises, assuming that no further statutory deductions were made for social security and medical benefits after October 2008, we award the Employee the sum of $21,320.00 being the equivalent of 12 months or 52 weeks pay ($410x 52) in lieu of notice.

31. It is ordered that the Employer shall pay to the Employee the said sum of $21,320.00 as payment in lieu of notice of his imposed retirement. Payment of that sum must be made no later than September 20, 2019.

Dated this day of August, 2019

……..…...…...……
Charlesworth O.D. Brown
President

……
Judith Dublin
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 43 OF 2015

BETWEEN

CALVIN AMBROSE

Employee

And

ANTIGUA & BARBUDA HOSPITALITY TRAINING INSTITUTE

Employer

Before:

The Hon. Charlesworth O.D. Brown President
The Hon. Judith Dublin Member
The Hon. John Benjamin Member

Appearances:
Mr. Lawrence Daniels of Daniels, Phillips & Associates, Attorneys-at-Law for the Employee
Mr. Martin Camacho, Deputy Solicitor General, Attorney-at-Law for the Employer

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2016: July 26
2019: August 16

JUDGMENT

Brown, P;

Background

1. The Employer is a body corporate established by the Hospitality Training Institute Act 2006. Its statutory aim is to provide a wide spectrum of academic and practical training for the promotion and encouragement of standards in the hospitality industry.

2. The Employee commenced his employment with the Employer on 19th September, 1990 as an Instructor. He was appointed Executive Director on 1st September, 2008 and served in that capacity until his dismissal on 27th February, 2015 on the ground of serious misconduct. The total of his emoluments at the date of his dismissal was $8,500.00 per month.

3. Following the national general elections in June 2014 the Employer's board, then chaired by Ms. Desiree Edwards, was dissolved. In or about July 2014, a new board chaired by Ms. Shirlene Nibbs was constituted.

4. By letter dated 22nd August, 2014 Ms. Nibbs notified the Employee of her desire "to build a culture of open communication, trust and integrity" as the theme of the Employer's core values.

5. In his capacity as Executive Director and member of the Employer's Board of Directors, the Employee attended board meetings during the months of October 2014 and January 2015. Over that period several issues arose between the Board and the Employee in respect of the absences or vacation leave of senior employees; perceived tardiness of some heads of departments; the Employee's poor performance; lunches provided to the government's Treasury Department; and the inventory, requisition and purchasing of the Employer's goods.

6. Based on its view that the Employee was performing below standard, the Board activated a Performance Deponent Plan. The Plan was signed by the Chairperson and the Employee on January 20, 2015 with a view to achieving and sustaining an improvement in the Employee's overall performance.

7. During the month of December 2014 and January 2015 the Board followed up its concerns and held a series of meetings with staff members. Eventually reports and records were produced by the Board which put the Employee in bad light.

8. Based on selected records of the Employer and related reports commissioned by the Board, the Employee was invited to a meeting with the Board on January 28, 2015. At the meeting he was shown certain documents and invited to respond to the Employer's allegations against him.

9. In light of his responses, the Board decided to suspend him forthwith pending its investigation of the several matters of concern. The Employee was escorted to his office by the Chairperson and three other members of the Board where he collected his personal belongings.

10. The issues raised by the Employer and the circumstances leading to the suspension are accurately reflected in the suspension letter dated January 30, 2015 which reads as follows:

"January 30, 2015

Mr. Calvin Ambrose
…
Dear Mr. Ambrose,

In our emergency meeting of January 28 2015, the Board of Directors of the ABHTI discussed a number of issues which involved the management of the Institute's finances.

Specifically the issues are:

- The payments of vacation in lieu of vacation time on several occasions including once during the month of September 2014, without the appropriate Board and other approval
- The payment to yourself of vacation not yet earned
- The use of the Institute's finances to pay the insurance coverage of a vehicle owned by you and or one other individual
- The use of the Institute's finances to pay for repairs to your vehicle
- The taking of gasoline on consignment from at least one service station while at the same time being paid the travel allowance provided for in your employment agreement.

You were invited to join the meeting at which time the specific issues were brought to your attention. With respect to the vacation payments you accepted that the payments were made and that you would check any discrepancy with respect to your entitlement. The issue of the vacation payments was also raised with you in the Board meeting of January 15 2015, at which time you gave a commitment to have the issue resolved.

On the issue of the gasoline consignment, you indicated there was Board approval. You further indicated you could not offer any explanation with respect to the payment of the insurance and repairs for your vehicle from the Institute's funds.

The issue of the Institute's finances being possibly used for purposes other than intended, without the appropriate approval, and in breach of accounting procedures is of serious concern to the Board of Directors, and which we believe must be clarified.

The Board of Directors has determined that the clarity needed can only be brought about through a thorough investigation into all the spending discussed with you. Consequently, we have decided that such an investigation is to take effect immediately. Further, as indicated to you, it is also necessary to place you on suspension to allow for the investigation to be held in a fair and uncompromised manner.

The conditions of the suspension are as follows:

- The period of suspension is for four weeks effective January 29, 2015
- During the period of suspension you will be paid all salary and benefits
- During the period of suspension you may be required to make yourself available to meet with the investigative panel appointed by the Board
- During the period of suspension any visit to the compound of ABHTI on your part shall be at the request of the investigative panel or the approval of the Board only.

The Board of Directors of the ABHTI looks forward to your cooperation over the next four weeks as we work to bring clarity and resolution to all the issues.

Sincerely,
Shirlene Nibbs
Chairperson
ABHTI Board of Directors

Cc:…

11. On 30th January, 2015 the Employer made an unsuccessful attempt to deliver its letter of suspension to the Employee. Subsequently on February 2nd, 09th, 10th and 17th similar unsuccessful attempts were made by the Employer to deliver the following letters on the Employee.

    (a) the letter of suspension dated 30th January, 2015.
    (b) the letter dated 2nd February, 2015 inviting the Employee to a meeting.
    (c) the letter dated 06th February, 2015 inviting the Employee to a rescheduled meeting.
    (d) the letter dated 16th February, 2015 disclosing investigative report.

12. On 17th February, 2015 while the Employee was on suspension, the Board received a letter from his Attorney-at-Law, Mr. Lawrence Daniels, alleging that he had been constructively dismissed and claiming compensation therefor.

13. In light of its unsuccessful attempts to deliver the said letters to the Employee and the Employees letter claiming constructive dismissal the Deputy Solicitor General, Mr. Martin Camacho, acting on behalf of the Employer, wrote to Mr. Daniels inviting the Employee to a meeting on 24th February, 2015 to address the issues.

14. Due to the unavailability of Mr. Daniels to attend the scheduled meeting, Mr. Camacho wrote a follow-up letter to him dated February 27, 2015 in which he:

    (a) Denied that the Employee had been constructively dismissed.
    (b) Outlined the Employer's position and submitting the five letters which the Employer had earlier unsuccessfully attempted to deliver to the Employee.
    (c) Requested the Employee's response to the allegations against him by 26th February, 2015.

15. In that letter, Mr. Camacho advised Mr. Daniels that: "In the absence of a response from you or your client the Board of the Institute may draw the conclusion that your client does not refute the allegations which have been made against him and the documentary evidence provided in support thereof."

16. By letter dated 27th February, 2015 the Employees was dismissed on the ground of "serious misconduct". In its comprehensive letter, the Employer outlined the background to the Employee's suspension, its several efforts to deliver the letters to him, and its discovery of "other questionable expenditure exposing the institute". The full text of the letter of dismissal reads:

    "February 27, 2015

    Mr. Calvin Ambrose
    ….

    Dear Mr. Ambrose

    On January 28, 2015 the Board of Directors of the Antigua and Barbuda Hospitality Training Institute ("the Institute") invited you to a meeting of even date and brought to your attention a number of areas of concern specific to the management of the Institute's finances. This followed a previous Board meeting of January 15, 2015 at which time it was brought to your attention the vacation records of the Institute up to that date indicated that you had overpaid yourself thirty nine (39) days' vacation. You gave a commitment at that meeting to have the matter corrected.

    During your attendance at the January 28, 2015 meeting the issue of the overpaid vacation as well as three (3) other areas of concern was discussed with you. These other areas are (i) the use of the Institute's finances to pay your private vehicle insurance coverage; (ii) the use of the Institute's finances to pay for repairs to your private vehicle; and (iii) crediting gasoline on the Institute's account for your private vehicle from Midway Service Station, while being paid a monthly travel allowance.

    In response to the concerns raised, you indicated to the Board of Directors that both the credit facility for gasoline at the Midway Service Station and the payment of your car insurance were both approved by the previous Board of Directors. The decision to use the Institute's finances to pay for repairs to your private

vehicle was an arrangement you said was made between yourself and the former Accountant. You further indicated that you were to repay those funds, but no payment was made. You had no further explanation on the vacation issue even after it was brought to your attention that the vacation issue had been further compounded by your request for an advance on vacation payment which was not approved through the appropriate channel, but which you proceeded to pay to yourself.

You were informed by the Board of Directors at the meeting of January 28th 2015 that it was necessary for an investigation to be conducted into the financial spendings discussed with you and that it had also become necessary to place you on suspension during the investigative process to ensure that the investigation is fair and was not compromised.

You were further informed that the suspension would be for a period of four (4) weeks and be with immediate effect January 29 2015 as it was already the close of the workday of January 28th 2015; that you would be paid full salary and all benefits during the period of suspension; that you should make yourself available to meet with the investigative panel during the period of suspension at times indicated by the panel; and that to ensure the process was not compromised you should not visit the compound of the ABHTI during the period of the suspension, except with the permission of the investigation panel and/or the Chairperson of the Institute's Board of Directors.

Since the commencement of your suspension, several efforts were made by the Institute to deliver to your letter of suspension, to invite you to meet with the investigative panel as well as to deliver a package with several documents related to the financial spendings. The efforts were by telephone, email and hand delivery on each occasion. The Institute's drivers and two other employees, as well as a police officer attempted to deliver to you said letters and a package on February 2, 2015, February 4, 2015, February 9, February 10 and February 17, 2015. On the first occasion when contacted by the Institute's driver Stephen Christian, who asked for directions to your home you informed him that he should deliver the letter to your lawyer. On the second occasion, you refused to respond to the Institute's driver Derek Martin who was accompanied by another employee of the Institute, who came to your home to deliver correspondence and a package to you. On the third occasion, you informed the police officer who was sent by the Institute to deliver correspondence to you that you will not be accepting anything from the Institute.

The Institute had also sent the letter suspension dated January 30, 2015 and a letter dated February 2, 2015 inviting you to meet with the investigate panel via email to your email address. You never responded, neither did you attend the meeting of the panel to which you were invited.

Since your suspension other questionable expenditure exposing the Institute have been uncovered. Your refusal to accept the correspondence and other documents sent to you to aid in the investigation as well as your failure to attend the meeting with the investigative panel indicates your deliberate refusal to cooperate in a process established to resolve concerns about the use of the Institute's finances over which you had responsibility and which involved you directly, as well as gross insubordination. Further, the investigative panel has examined the Institute's records including the minutes of meetings of the Board of Directors spanning several years and found no evidence of the Board's authorization of any of the expenditure as indicated by you in the meeting of January 28, 2015. Neither was there any appropriate approval for the vacation payment in excess of earned leave.

A letter dated February 17, 2015 was received from your Attorney Mr. Lawrence Daniels of Daniels, Phillips & Associates. The institute instructed the Deputy Solicitor General to respond on its behalf to your Attorney. Letters dated February 20, 2015, February 24, 2015 and February 27, 2015 were sent to your Attorney by the Deputy Solicitor General.

Having given due consideration to your refusal to accept the correspondence sent to you by the Institute's Board of Directors, your failure to attend the meetings set by the investigative panel, the misappropriation of the Institute's finances for your personal use, the letter from your Attorney dated February 17, 2015, the allegations of which are denied, and the letters of the Deputy Solicitor General dated February 20, 24 and 27, 2015 the Board of Directors of the Antigua and Barbuda Hospitality Training Institute has taken

the decision to terminate your employment with the Institute effective February 27, 2015 due to your serious misconduct.

We wish also to advise you that the Institute intends to make a claim against you for the repayment of all of the Institute's monies which you have used for personal expenses and for which appropriate approval was not given.

Yours truly,
Shirlene A. Nibbs
Chairperson

cc. …"

17. By letter dated 03rd March, 2015 to the Deputy Solicitor General, the Employee, through his Attorney-at-Law, maintained that he had been constructively dismissed.

The Opposing Cases

18. In his Reference filed on 27th July, 2015 commencing these proceedings, the Employee identified the main issue to be: "Whether or not the Employee was wrongfully and/or unfairly terminated on 28th January, 2015." It is noteworthy that constructive dismissal was not included among the seven issues listed.

19. By its Memorandum of Claim filed on 4th September, 2015, the Employee recited the chronology of events leading to his dismissal. Atypically, the last 5 paragraphs read as follows:

"41. That the Employee was suspended for one (1) month and was dismissed before the suspension was up or before the date for him to resume his work.
42. That the Employee receives no notice pay, no holiday pay and no severance pay.
43. That the Employee's dismissal was against the spirit of the Labour Code.
44. That the Employee was not given a date for any hearing for the reason for his suspension and was dismissed without due process of natural justice.
45. That the Employee was escorted off the compound like a common criminal and all the keys and ID to his office were taken. No letter was ever issued to the Employee setting out the reason for his suspension or resumption of work."

20. Strikingly, without laying the necessary foundation, in his prayer for relief the Employee claimed "the sum of $184,000.00 for constructive dismissal. Interestingly, the Employee also claimed the sum of $68,000.00 as "eight months loss of job protection".

21. Not surprisingly, the Employer's Memorandum of Defense was structured to answer in sequence the assertions in the Employee's Memorandum. Ultimately, save for admitting that "the Employee received no notice pay, holiday pay or severance pay." when he was dismissed, the Employer joined issue with the Employee on its claim.

The Main Issues

22. Based on the contents of the Memoranda, we have identified the main issues for our determination as follows:

(1) Whether the Employee was unfairly suspended?
(2) Whether the Employee was constructively dismissed?
(3) Whether the Employer had sufficient factual bases for its assignment of "serious misconduct" as a good cause for the dismissal of the Employee.
(4) Whether, in the circumstances, the Employer acted reasonably in dismissing the Employee on the ground of serious misconduct.

Issue No.1: Whether the Employee was unfairly suspended

23. The resolution of this issue, as well as Issues No. 3 and 4 will be determined within the parameters of the provisions of Sections B3, C58, C59 of the Antigua & Barbuda Labour Code (the Labour Code) which read as follows:

> "B3 ***"suspension" means temporary lay off from work for not more than four weeks with or without pay as a penalty or pending investigation of the employee's alleged misconduct."***
>
> ***C58 (1) 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) …***
>
> ***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 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) …***
> ***(d)***
>
> ***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."***

24. In **Reference No. 56 of 2016 Otis Teague v Antigua & Barbuda Utilities Authority** this Court examined the statutory provisions in respect of suspensions and concluded that although there are no express provisions dealing with investigatory suspensions, it is clear that they may be effected under section C 59 (3) provided that the period of suspension does not exceed the 4 week limit established by the definition of suspension under section B3.

25. As to whether the Employer had sufficient bases for suspending the Employee on 28th January, 2015, we wholly accept the testimony of Mrs. Nibbs that as at that date several serious irregularities, which had come to its attention, were in turn brought to the attention of the Employee. These include those set out in the suspension letter dated January 30, 2015 which is substantially reproduced at paragraph 10 above.

26. The Employee was allowed to respond to the several allegations, after which the Board decided that a further and more thorough investigation was required immediately. In the circumstances, in light of the Employee's responses, it was proper and reasonable for the Employer to immediately suspend the Employee for a period of 4 weeks so that it could conduct an "uncompromised investigation" into the several irregularities.

27. We accept Ms. Nibbs' evidence that the Employee was advised that the letter of suspension would be issued to him within 48 hours after the commencement of the suspension. We are satisfied that letter was in fact issued but the Employer's efforts to deliver it to the Employee were rendered futile by his deliberate evasion.

28. In the final analysis, we are satisfied that a reasonable suspension was effected for the purpose of conducting the desired proper investigation. The suspension was imposed in conformity with the provisions of sections B3 and C 59 (3) of the Labour Code. It started on 29th January 2015 and ended on 25th February 2015.

29. Accordingly, we find no fault with the suspension of the Employee and the content of the suspension letter dated 30th January, 2015 of which the Employee is deemed to have had full knowledge at the material time.

30. In the premises, we resolve Issue No.1 in favour of the Employer. The Employee was not unfairly suspended.

Issue No.2: Whether the Employee was constructively dismissed?

31. Unlike Issues No.1, 3 and 4, this issue does not turn on the statutory provisions. It derives from the inherent nature of the contract of employment. In that regard, the threshold for establishing a successful claim of constructive dismissal is the existence of a breach of an express or implied fundamental term of the contract of employment.

32. In his closing submissions, learned Counsel for the Employer relied on the principles laid down in the landmark judgment of **Western Excavating (EEC) Ltd. v. Sharp [1978] IRIR 27**. Those principles have been applied by this Court on several occasions, the last of which was Reference No. 50 of 2015: **Deborah Lake v. Antigua Commercial Bank**.

33. Based on the leading authority of the **Western Excavating case** and the previous application of the relevant principles in by this Court, we are of the opinion that the Employee's claim of constructive dismissal is spurious at best. We are easily persuaded by Mr. Camacho's submission that there was no breach of any fundamental term, express or implied, of the contract of employment. We wholly agree with learned Counsel's submissions regarding the lawful and reasonable course of action taken by the Employer in respect of the irregularities in its affairs and its conclusions or suspicions about the conduct of the Employee.

34. In any event, the Employee failed to establish any good grounds for its claim of constructive dismissal either in his Memorandum of Claim or by his evidence.

Issue No. 3: Whether there were any factual bases for the assignment of serious misconduct as a good cause for dismissal?

35. There is no doubt that under section C 58 (1) of the Labour Code serious misconduct is a potentially good cause for dismissal subject always to the proviso that there is a good factual basis for that assigned reason. Clearly, this is a question of fact to be determined on the balance of probabilities based on the oral testimony of the witnesses as well as the documentary evidence. To the desired end, we carefully observed the demeanor and assessed the veracity of each witness.

36. On the one hand, the Employee testified on his own behalf and had no supporting witnesses. On the other hand, Ms. Nibbs and no less than 6 corroborating witnesses testified on behalf of the Employer. At first blush, it was noticeable that the Employer's evidence was preponderant both in terms of scope and pertinent particulars. After careful consideration of the latter as a whole, we conclude that it was more credible than that of the Employee. In passing, we note the Employee's omission to call Ms. Edwards, the predecessor Chairman of the Board and/ or any other member of the predecessor Board to corroborate his testimony and perhaps serve as a counterbalance the Employer's several witnesses.

37. It is also noteworthy that under cross examination, the Employee did not strike us as being as assertive and as believable as would be objectively expected given the position he held as the Employer's Executive Director. To the contrary, his answers to questions put to him under cross-examination tended to be tentative and lacking in conviction. In particular, when the absence of any record of certain alleged board decisions was put to him, he repeatedly responded that he "would be surprised" if such decisions were not recorded.

38. Importantly, the Employee admitted that he was aware that the Board was concerned about several irregularities which developed under his watch, including those listed in the suspension letter reproduced at paragraph 10 above.

39. Moreover, as to the Performance Improvement Plan, the Employee admitted that the Board brought it to his attention that it was concerned about his job performance. In that regard, he testified that he agreed to embark on Plan. Further, the Employee also admitted that other matters of concern, which were documented by the Employer, were brought to his attention including the Disparity Vacation Report which showed that he had exceeded his vacation entitlement by over 23 days and had received cheques for payment in lieu of vacation to which he was not entitled and which were not approved.

40. In addition, the Employee admitted that at the Board meeting on January 28, 2015, a number of documented financial irregularities were brought to his attention. He also admitted that during the meeting Ms. Nibbs told him that those were "serious matters" and that he would be placed on suspension for 4 weeks to ensure that the planned investigation would not be compromised. Further, the Employee admitted that Ms. Nibbs told him that the Board expected his full cooperation during its investigation.

41. As to the Employer's efforts to deliver the letter of suspension and other documents to him after January 28, 2015, the Employee admitted that efforts were made by Mr. Stephen Christian and Mr. Derek Martin both of whom he directed to his lawyer without naming that person. When the question was put to him by the Court as to whether he had received documents by email, the Employee responded that his computer was "down" during the month of January 2015.

42. As to the Board's efforts to convene a meeting with him during the period of his suspension, the Employee admitted that he did not make himself available. He also admitted that even after he had received the bundle of documents from his Attorney he never attended any meeting with the Board because by then he was already contending that he had been constructively dismissed.

43. We note here that the evidence of Inspector Ray A. John of the Royal Police Force is particularly instructive in so far as it confirms the Employee's negative, uncooperative and "dismissive" attitude towards the Employer.

44. In the circumstances, based on the Employee's own testimony, we are inclined to conclude that there were good factual bases for the Employer's conclusion that he was guilty of serious misconduct.

45. On the balance of probabilities, we find that when the Employee was suspended with effect from January 29, 2015, it was or should have been clear to him that the Board suspected that he was using or benefitting from the use of the Employer's finances for purposes other than those intended without appropriate approval. In this regard, we note that in his comprehensive analysis of the pertinent evidence, Mr. Camacho underscored the several issues subsisting as at January 28, 2015 and the Employee's responses. We accept his summary as being accurate.

46. We also adopt learned Counsel's summary, which we consider to be accurate, as to what was said to the Employee at the time of his suspension.

47. In the circumstances, we resolve this issue in favour of the Employer. There were clear factual bases, of which the Employee was well aware, for the Employer's conclusion that he was guilty of serious misconduct.

Issue No. 4: Whether the Employer acted reasonably?

48. We are satisfied that during the period of suspension, the Employer continued its investigation regarding the matters alleged against the Employee. The Board searched through the Minutes of Board meetings of the predecessor board

and other records but found no explanation or authorization for any of the financial benefits which the Employee apparently received but was not entitled to.

49. For convenience, we also adopt the submissions on the facts made by Mr. Camacho which are all consistent with the dismissal letter and the evidence of Ms. Nibbs.

50. Having regard to all the circumstances, we conclude as follows:

(1) The Employee knew what was alleged against him;
(2) There were clear factual bases for the Employee's alleged misconduct;
(3) The suspension of the Employee was reasonable in the circumstances;
(4) The investigation carried out by the Employer was diligent;
(5) The Employer invited the Employee to participate in the investigations;
(6) The Employee refused to participate in the investigative process.
(7) The Employee deliberately evaded the delivery of the Employer's letters to him;
(8) The Employer offered the Employee adequate opportunities to be heard in his own defence;
(9) The Employee consciously refused to avail himself of the opportunities to be heard in his own defence;
(10) There was no denial of natural justice.

51. In the final analysis, we find that the Employer (a) established a sound factual basis under section C 58 (1) for its conclusion regarding the Employee's misconduct; (b) passed the test of reasonableness under section C 58 (2), and acted reasonably in dismissing the Employee on the ground of serious misconduct under section C 59 (1) (a) of the Labour Code.

52. In the premises, we dismiss the Employee's claim in its entirety and make no order as to costs.

Dated this day of August, 2019

……..…...…...……
Charlesworth O.D. Brown
President

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Judith Dublin
Member

……
John Benjamin
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 15 OF 2018

BETWEEN:

COSIER LEWIS

Employee

and

PAPARAZZI PIZZERIA & BAR

Employer

Before:
The Hon. Charlesworth O.D. Brown President

Appearances:
Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation, Representative for the Employee
Mr. Kwame L. Simon of Chancellor Chambers, Attorney-at-Law for the Employer

2018: June 29
2019: July 24

JUDGMENT

Brown, P;

Background

1. These proceedings were commenced by the Reference of Complaint filed on March 23, 2018 by which the Employee identified the issues in dispute to be constructive/unfair dismissal; service charge and reduction of wages.

2. In her Memorandum of Claim filed on March 23, 2018 the Employee set out relevant background facts and contended that she was unfairly dismissed and is entitled to compensation.

3. In its Memorandum of Defence filed on June 08, 2018 the Employer, Restaurant Paparazzi Company Limited, referred to by its trade name in these proceedings, admitted that the Employee was unfairly dismissed. However, it joined issue with the Employee's Claim on factual grounds and sought a hearing for the assessment of damages payable to her.

The Assessment

4. The assessment was informed by my determination of the facts based on the written and oral testimony of the parties as well as supporting documentary evidence. Naturally, in the process, I assessed the credibility of the Employee on the one hand and Mr. Drego Taibi, the Employer's owner/operator, on the other hand.

5. In the final analysis, based on my findings of fact which are pertinent for the assessment, I award compensation as follows:

   (1) Payment in Lieu of Notice of Dismissal
   I award the sum of $520.00, as agreed between the parties, being 5 days' pay at the rate of $104.00 per day.

   (2) Loss of Protection from Unfair Dismissal
   The parties share common ground as to the Employee's entitlement under this heading. As the equivalent of severance entitlement under a redundancy situation, **I award the Employee the sum of $1,040.00**, being one day's pay for each month of employment. ($104.00 x 10)

   (3) Immediate Loss and Future Loss
   The Employee testified that in October 2017 soon after her dismissal she found alternative employment at a higher rate of pay. In the circumstances, I accept the Employer's submission that the Employee is not entitled to compensation under these heads.

   (4) Manner of Dismissal
   Although the Employee made no specific claim under this head, Mr. Simon, Counsel for the Employer recognized that "the termination was not in accordance with good industrial practice and relations." Accordingly, the Employer offered compensation in the sum of $4,506.66, the equivalent of two months' salary, under this head. However, having regard to the underpinning principles, I make no award under this head.

(5) Exemplary Damages

Exemplary damages may be awarded by the Court under Section 10 (5) of the Industrial Court Act in circumstances where "an employee has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice".

(a) In his effort to justify an award of exemplary damages, Mr. Carty relied on several grounds, the following three of which were admitted by the Employer in its Memorandum:

"

- ***The Employer did not issue a contract of employment to the Employee.***
- ***The Employer did not issue a letter to the Employee advising of temporary lay-off from June to September 2017.***
- ***The Employer departed from proper practice and procedure in terminating the Employee."***

(b) In addition to those breaches admitted by the Employer, Mr. Carty also relied on other grounds including the following:

(1) On September 27, 2017 her supervisor, the Employer's Chef "verbally attacked and assaulted" the Employee by cursing her and pointing his hands in her face.

(2) The Employer unilaterally reduced the Employee's rate of pay downwards from $13 to $12 per hour.

(c) In my opinion, in the normal course of things, as the Employee's Supervisor the Chef's words and actions were implicitly those of the Employer. Although, Mr. Taibi denied that the Chef was acting on his behalf when the alleged assault took place, I would conclude that the verbal attack and physical assault occurred with at least the prior tacit approval or subsequent condonation of the Employer.

(d) There is no evidence to support the Employer's contention that the Employee was dismissed on account of her "long standing disruptive influence", her "poor work ethic" and "her confrontational disposition". It is unfortunate that the Employer did not at any point formally communicate to the Employee its dissatisfaction with her conduct or otherwise take any disciplinary action against her. Further, in relation to the employment of the Cuban Waitress, which commenced in September 2017, it was not unreasonable for the Employee to raise her concerns in light of her two lay-offs in the preceding few months. In that regard, the Employer confirmed that the Employee was the only worker laid off on 1st October, 2017. In the circumstances, I conclude that the Employee's lay-off and subsequent dismissal were motivated by reasons other than the seasonal downturn of the Employer's business.

(e) As to the Employer's decision to reduce the Employee's wage rate from $13.00 to $12.00 per hour, I accept the Employee's testimony that she had not agreed and was not aware in advance of the Employer's decision to reduce her wage rate. Similarly, I find that the Employee was not aware in advance of the relocation of the business during the lay-off period between June and September 2017.

(f) The relocation of the business and the reduction of the wage rate are particularly critical because they were fundamental changes going to the root of the employment contract. In that regard, I am mindful of the general statutory obligation and burden on the Employer under section C 5 of the Labour Code in relation to amendments to the fundamental working conditions. In the circumstances, apart from finding the Employee a more credible witness, I fault the Employer for not formally communicating with the Employee on those important aspects of the employment contract.

(g) In addition, although Employer asserted that it "had in fact remitted taxes on behalf of the Employee to the various statutory bodies", I find that as at the month May 2017, it had not done so. It was therefore in breach of its statutory obligations.

(h) Further, although the Employee previously received a designated share of the Employer's service charge fund, I find that she was not paid any share during the first week of September 2017.

(i) At the end of the day, upon consideration of the limited evidence available on a balance of probabilities, it is my opinion that nthe Employee has established good grounds for an award of exemplary damages: She was dismissed in circumstances that are harsh and oppressive and not in accordance with the principles of good industrial relations practice.

(j) Having regard to the Employer's offer of two months' wages in the sum of $4,506.66 under the heading "Manner of Dismissal", **I award exemplary damages in the sum of $7,000.00.**

(6) Pay in Lieu of Accrued Vacation
The documentary evidence submitted shows clearly that on the payroll for December 2016 the sum of $26.00 was deducted from the Employee's weekly pay. In the absence of any contradictory evidence, I conclude that the Employee was in fact paid in lieu of vacation on a weekly basis. As a result I make no award under this head.

(7) Service Charge
The Employee's testimony establishes that she received an average of $250.00 per week as her share of the service charge fund. Her testimony that she was not paid for September 2017 was not challenged by the Employer. As a result, **I award her the sum of $1,000.00 under this head.**

(8) Difference in pay after wages reduced
Given my earlier finding that the Employee received $1.00 less than the amount to which she was entitled. Accordingly, her weekly entitlement was for an additional $40.00 ($8 per day x 5 days per week) **I award the sum of $160.00 under this head.**

Order

6. In the premises, it is ordered that the Employer do pay to the Employee the total sum of $9,720.00. Payment of the said sum to be made no later than August 30, 2019.

Dated the 24th day of July, 2019

……...……..……
Charlesworth O.D. Brown
President