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CONTENTS

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Denise Dublin, Acting Editor of the Official Gazette
denise.dublin@ab.gov.ag / antiguagazette@gmail.com
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Notice Submissions and Style

Notices for publication and related correspondence should be addressed to Denise Dublin Acting Editor of the Official Gazette at the following email addresses: **denise.dublin@ab.gov.ag / antiguagazette@gmail.com**

That is the preferred method of communication for **all** correspondence (especially when sending Notices/information which must be sent in Microsoft Word format) to be published in the Gazette.

Letter headings should be addressed to:
Ms. Denise Dublin
Acting Editor of the Official Gazette
Ministry of Justice & Legal Affairs
Parliament Drive
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P.O. Box 118
Antigua

Microsoft Word is the preferred format for notice submissions. Please do not send notices only in PDF format as errors may occur when converting to Word. Image files should be sent in JPG or PNG format.

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The Gazette Department reserves the right to apply its in-house style to all notices. Any corrections which are related to style will be made at the discretion of the Editor for reasons of consistency.

Deadlines

The deadline for submitting notices for publication in the principal edition is midday Monday on every week for all commercial and Government notices, in the week of publication.

*Late notices may be accepted at the discretion of the Editor.

The deadline for cancelling notices in the principal edition is 12.00 midday Wednesday. Please call the Gazette Office immediately to cancel a notice, and confirm by email.

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NOTICES

No. 45

The following STATUTORY INSTRUMENT is circulated with this Gazette and forms part thereof:

STATUTORY INSTRUMENT

No. 70 of 2020, "The Prevention of Terrorism (Security Council Resolution) (Amendment) (No.10) Order, 2020"

5pp Price $2.25

Sagicor Life Inc Notice

SAGICOR LIFE (EASTERN CARIBBEAN) INC.

Harvey Brookes of **Law Pasture, St. John's, Antigua** having made sworn deposition that **Policy No. S05033629** issued by Sagicor Life Inc and assumed by Sagicor Life (Eastern Caribbean) Inc on his life has been lost and having made application to the Directors to grant a duplicate of the same, notice is hereby given that unless objection is raised within one month of the date hereof, the duplicate policy asked for will be issued.

Dated: August 20, 2020

By Order

Althea C. Hazzard,
Corporate Secretary.

Antigua and Barbuda Bureau of Standards

The Antigua and Barbuda Bureau of Standards wishes to advise the General Public and all stakeholder agencies that effective November 06, 2020 the following standards shall be declared to be Standards, and Antigua and Barbuda Standards, pursuant to section 17 (1) and (3) of the Standards Act (411) of the revised laws of Antigua and Barbuda, 1992 edition and section 3 (1) of the Standards Regulations 1998: -

1) **ABNS CRS 57: 2018 Energy labelling – Refrigerating appliances – Requirements (CRS 57: 2018 IDT)**

   Scope

   This standard establishes the minimum energy performance standards (MEPs) for refrigerating appliances and relevant test method to specify the energy label. It also specifies the energy label requirements.

2) **ABNS CRS 58: 2018 Energy labelling – Compact fluorescent lamps and light emitting diode lamps – Requirements (CRS 58: 2018 IDT)**
   Scope

   This standard specifies the relevant test methods and a proposed energy efficiency label design for the following:

   a) Self-ballasted compact fluorescent lamps (CFL) of voltages > 50 V;

   b) Integrated light-emitting diode lamps (LEDi) for stable operations, intended for domestic and similar general lighting purposes, having a:

      1) rated power up to 60 W;

      2) rated voltage of > 50 V a.c up to 250 V a.c.

This standard does not apply to semi-integrated (LEDsi) and non-integrated (LEDni) light-emitting diode lamps.

3) ABNS CRS 59: 2019 Energy labelling – Air conditioners – Requirements (CRS 59: 2019 IDT)

Scope

This document specifies the energy labelling requirements and the Minimum Energy Performance (MEPS) requirements for non-ducted air-conditioners, single-package or split-system, with only one interior unit, via the following parameters:

— Energy efficiency ratio (EER);

— Coefficiency of performance (COP).

The National Adoption of these standards was supervised by the National Electrotechnical Committee and approved by the Antigua and Barbuda Standards Council on September 16, 2020.

Interested persons can purchase copies of these standards from:

Antigua and Barbuda Bureau of Standards
Old Parham Road
Telephone: 462 2424
Fax: 562 0094
Email: abbs@ab.gov.ag

Industrial Court Judgements

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 42 OF 2015

BETWEEN

JULIE OSBORNE

Employee

And

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Employers

Before:
The Hon. Charlesworth O.D. Brown **President**
The Hon. Megan Samuel-Fields **Member**
The Hon. John Benjamin **Member**

Appearances:
Ms. Kathleen A. Bennett of Lake & Kentish, Attorneys-at-Law for the Employee
Mrs. Carla Brooks-Harris, Ms. Alicia Aska and Ms. Rose-Anne Kim of the Attorney General's Chambers, Attorneys-at-Law for the Employers

2016: November 03
2019: September 13

JUDGMENT

Brown, P;

Background

1. In her Reference of Complaint filed on 24th July 2015 the Employee identified the issue in dispute between the parties to be "Whether disciplinary action was unfairly taken against the Employee."

2. Paragraph 9 of the Employee's memorandum of Claim filed on 24th July 2015 reads:

> ***"9. The Employee contends that the Employer's unfair disciplinary action against her and her subsequent unfair treatment have caused her to suffer a loss of chance/opportunity for promotion, for which she should be compensated. The warning letter that was also wrongly issued to the Employee should be removed from her file."***

3. By its Memorandum of Defence filed on 21st September 2016 the Employer joined issue with the Employee's Claim. Paragraph 9 of its Memorandum reads:

> ***"9. Paragraph 9 of the Employee's Memorandum is denied and the Employer wishes the Employee to prove the contents of paragraph 9. The Employer contends that the employee's claim of unfair disciplinary action against her is barred by virtue of laches and in any event the warning letter has expired and therefore is of no effect."***

4. In her closing submissions filed on 16th November 2016 Ms. Kathleen Bennett, Counsel for the Employee, identified the issues as follows:

> ***"ISSUES***
> ***6. Was the warning letter dated 18th June 2007 wrongly issued to the employee?***
> ***7. Did the employee suffer a loss of opportunity for promotion due to subsequent unfair treatment by the employer? "***

5. In her closing submissions filed on 10th November 2016 Mrs. Carla Brooks-Harris, Counsel for the Employer, submitted as follows:

> ***"ISSUES***
> ***2. The issues for determination by the Industrial Court are:***
>
> ***i. Whether the warning letter dated 18th June, 2007 was wrongly issued to the Employee.***
> ***ii. Whether the Employee was treated unfairly by the Employer and as a result suffered a loss opportunity or chance to be promoted."***

The Legal Framework

6. Being a creature of statue, this Court's jurisdiction is substantially limited by the provisions of the Industrial Court Act, Cap. 214, and the Antigua and Barbuda Labour Code, Cap 27, of the Laws of Antigua and Barbuda. In that regard, it is trite to say that rights of employees which this Court upholds or protects are derived from express statutory provisions. It follows logically that this Court has no jurisdiction or power to deal with matters which have no basis in the statutory provisions of the said two Acts.

7. Section B (9) (1) of the Labour Code sets out the following main categories of statutory rights which may be protected and enforced, based on which "questions, petitions, charges or complaints" may be filed by employees towards remedies for their infringement:

(1) The right to severance pay under Part 4 of Division C;
(2) The right not to be unfairly dismissed or suspended under Part 5 of Division C;
(3) The right to Representation of their choice under Division J; and

(4) The protection of Self Organizational Rights under Part 1 of Division K.

We hasten to add that several ancillary or supplemental statutory and common law rights arise from or are associated with those categories.

8. In Reference No. 26 of 2017**: Icilma Francis-Piggott –v- First Caribbean International Bank** (the Francis-Piggott Case) the Employee identified the issue between the parties as "Unfair Labour Practices". The Employer filed a preliminary application, the nub of which was stated at paragraph 3 in the Court's Decision as follows:

> ***"3. By its application the Employer applied for an order (a) striking out the Reference; and (b) declining jurisdiction to hear this Reference. The application listed 7 grounds which essentially assert that the Employee's Claim of "Unfair Labour Practice" is not sustainable because the laws of Antigua & Barbuda do not include any right of action for such a complaint. As a result, being a creature of statute, this Court has no jurisdiction to hear and determine the Employee's claim. Accordingly, this Court should decline to exercise its jurisdiction and strike out the Reference."***

9. In light of that decision, although no similar application was made in the instant case, we are obliged to consider whether this Court has the jurisdiction to determine the complaint now before us as formulated by the parties respectively and reproduced at paragraphs 4 and 5 above.

The Francis-Piggott Case

10. We are of the opinion that this Court's decision in **the Francis-Piggott Case** is most instructive and should be applied towards the determination of this matter. In that case Learned Counsel for the Employer noted that there was no mention of the term "unfair labour practice" in statute law in Antigua and Barbuda. In that regard, he highlighted subsection 7 (1) of the Industrial Court Act, Cap. 214 (the Act) which establishes the jurisdiction of the Court. He also referred to and relied on subsections 10 (1), 10 (4) and 10 (5) of the Act which deals with powers of the Court. He submitted that, as expressed in those subsections, the Court's jurisdiction is limited to matters which deal with trade disputes, trade unions and complaints brought in accordance with the Act, and other matters referred to it under the Act.

11. In addition, learned Counsel also submitted that "unfair labour practices" are neither expressly nor impliedly addressed in the Act. In support of his submissions, Counsel cited the landmark judgment of the Court of Appeal in Suit No. 21 of 1993: Universal Caribbean Establishment v. James Harrison (the Harrison case) in which the Court of Appeal held that matters of unfair dismissals were included in the terms "any matter" or "other matters" and as such were within the purview of the jurisdiction of this Court.

12. In relation to the Antigua and Barbuda Labour Code (the Labour Code), Learned Counsel also noted that unlike those establishing a right not to be unfairly dismissed, there are no corresponding provisions bestowing on an employee the right not to be subjected to unfair labour practices.

13. Learned Counsel also submitted that, like a complaint of a denial of natural justice, the employee's complaint of unfair labour practices, in the absence of any express statutory provisions, must be pinned to a substantive claim like unfair dismissal and cannot be pursued on its own.

14. Counsel's further submissions in the **Francis-Piggott case** and this Court's response are summarized in the following excerpts from that decision:

> **"14. In his submissions, Counsel also attacked the formulation of the Employee's claim. He noted that there is nothing in the law giving an employee the right to a particular position. Based on its own observation and assessment, an employer has the absolute discretion as to which employee should be promoted to fill a particular position.**
>
> **15. Finally, Counsel submitted that unlike in Antigua and Barbuda, statute in some other jurisdictions such as South Africa, Canada and the United States of America, expressly define or explain the term "unfair labour practices". In those jurisdictions an employee has the statutory right not to be subjected to unfair labour practices.**

16. In the premises, the Employer contended that the Employee's complaint of "unfair labour practices" is unknown to the Labour Code and the Industrial Court Act, as a result of which, her Memorandum of Claim should be struck out.

…

29. Thus, the nub of Mr. Simon's submissions is that, in the absence of such a right in respect of labour practices, the employee has no good basis for his claim. Counsel emphasized that in Antigua & Barbuda employees have no distinct statutory right to fair labour practices. Stated differently, in Antigua & Barbuda employees have no express statutory right not to be subjected to unfair labour practices.

30. As submitted by Counsel, the sections of the statutes furnished by him show that the position is different in South Africa, Canada and the United States of America. In the case of South Africa, under Section 23, of Chapter 2 of the South Africa Bill of Rights, under the heading "Labour Relations", it is provided that:

> **"23 (1) Everyone has the right to fair labour practices."**

…

34. We accept as a matter of fact that the term "Unfair Labour Practices" is not defined or explained in either the Industrial Court Act or the Labour Code. Moreover, as submitted by Counsel, unlike the jurisdictions mentioned above, there is no statutory right not to be subjected to "unfair labour practices". And even if such a right could be implied at common law, there exists no remedy under the Act for its breach.

35. It is also noteworthy that learned Queen's Counsel asserted that the notion of natural justice at common law is an important component in the consideration of an unfair dismissal. However, the statutory provisions do not include a right to natural justice so that a complaint of the denial of natural justice without more cannot stand on its own and is not sustainable by itself in this Court of limited statutory jurisdiction. The same logic applies to the complaint of Unfair Labour Practice. Both a complaint of denial of natural justice and one of unfair labour practice involve substantially procedural issues. They can be the genesis or the foundation of support or be part of a claim of unfair dismissal or unfair suspension but cannot stand on their own."

15. Having regard to the evidence before us in the instant case, the issues as formulated by both Counsel, their respective submissions and this Court's decision in **the Francis-Piggott case**, we are constrained to conclude as follows:

Conclusion

16. Upon application of the Francis-Piggott case, we conclude that the Employee has no statutory right not to be "wrongly issued" with a warning letter. And in any event, no remedy is prescribed in the Labour Code or the Industrial Court Act for the wrong issuance of a warning letter, per se.

17. In addition, we conclude that the Employee has no statutory right to "fair treatment", per se. And in any event, no remedy for unfair treatment is prescribed in the Labour Code or the Industrial Court Act.

18. Further we conclude that the Employee has no right to an opportunity for advancement or a promotion, per se. And in any event, no remedy is prescribed in the Labour Code or the Industrial Court Act for denial of an opportunity for advancement or a denial of promotion.

19. In the final analysis, although we would be obliged to consider the issues in this matter under the umbrella of a claim of unfair dismissal or suspension, we have no jurisdiction to determine this matter on its merits as it stands before us. Accordingly, we are constrained to dismiss the Employee's claim for want of jurisdiction.

20. In closing, for the avoidance of doubt, we emphasize that we are constrained by existing provisions of the Labour Code and the Industrial Court Act. In that regard, we also emphasize that the wrong issuance of a warning letter, the

loss opportunity for promotion and other kinds of unfair treatment may be critical ancillary issues for determination in the context of unfair dismissals and the denial of other statutory rights, the main categories of which are listed at paragraph 7 above. Needless to say, any expansion of this Court's jurisdiction and / or powers, such as a right not to be unfairly treated, are matters squarely within the exclusive purview of Parliament.

Dated the day of September 2019

Charlesworth O.D. Brown,
President

John Benjamin,
Member

Megan Samuel-Fields,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 51 OF 2014

BETWEEN

KENROY CALLICA

Employee

and

BIG BANANA HOLDING COMPANY LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown	President
The Hon. Dr. Hayden Thomas	Member
The Hon. Judith Dublin	Member

Appearances:

Ms. Cicely Charles of Antigua Hotel Management Association for the Employee
Mr. Anderson E. Carty of Antigua & Barbuda Tradesmen & United Workers' Federation for the Employer

2016: October 20
2019: May 31

JUDGMENT

Brown, P;

Background

1. The Employee commenced his employment with the Employer on 21th August, 1991. His last position was that of Sous Chef for which he earned $1,966.91 per fortnight. He was required to report to the Executive Chef with whom he shared a close personal relationship.

2. Separate and apart from his employment with the Employer the Employee also carried on a small business whereby he prepared and sold food to the general public from a location at the West Bus Station.

3. On 05th June, 2010 the Employee had certain raw food items in his possession during the course of his employment. At the end of his shift at 11:00 p.m., with the voluntary assistance of other staff members, the Employee prepared the items for sale in his personal business. He utilized the facilities of the Employer to do so.

4. On 08th June, 2010 the Employee was summoned to a meeting with the Employer's management staff. At that meeting he admitted using the Employer's facilities from time to time to prepare food items for sale in his personal business. However, he took the position that there was a business arrangement between the Employer and himself whereby the Employer would sometimes borrow some of his utensils and he would be permitted to use the Employer's facilities. Moreover, the Employee also maintained that he had earlier obtained the approval of management to prepare his personal items on its premises and using its facilities.

5. By letter dated 10th June, 2010 the Employee was summarily dismissed on the ground that his "action as a whole is a most serious breach of the rules" which would not be tolerated. The Employer also asserted that the Employee had been "depriving the company of its substantial resources, both human and material, with impunity admittedly for months…"

6. According to the Employee, at all material times, his employment was subject to a Disciplinary Code which required the Employer to respectively warn or suspend the Employee in the first instance where he had committed the offences of either the "unauthorized use of facilities" or "using business property-machinery and equipment for an unauthorized purpose."

7. Being dissatisfied with his dismissal, the Employee commenced these proceedings, on 20th October, 2014 and identified the main issue between the parties to be "Unfair Dismissal".

8. In his Memorandum of Claim filed on 14th November, 2014, the Employee averred that during his tenure "he was never formally warned or written to" in relation to using the Employer's utensils. He also stated that he loaned a "few chafing dishes and other food and beverage utensils" to the Employer from time to time.

9. In its Memorandum of Defence filed on 6th June, 2016, the Employer averred that the Head Chef had persistently warned "the Employee to desist from preparing his private items in the Employer's Kitchen. The Employer also pleaded that the Employee admitted wrong doing and that he was fully aware that he could have been dismissed but begged Management not to dismiss him.

The Legal Framework

10. It is clear that in accordance with section C 58 (1) of the Antigua and Barbuda Labour Code, the Employer relies on misconduct as good cause for the Employee's dismissal. The proviso in that section is that there must be a factual basis for that assigned reason. Section C 58 (1) reads:

> ***"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) relates to the capability or qualifications of the employee t perform work of the kind he was employed to do, within the limitations of section C59 (2);***
> ***(c) is that the employee was made redundant;***
> ***(d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or***
> ***(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held;***
>
> ***Provided, however, that there is a factual basis for the assigned reason."***

11. Section C59 (1) allows for the summary dismissal of an employee who is guilty of serious misconduct such that the employer could not reasonably be expected to continue the employment relationship. That section provides:

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

12. An employer's action in dismissing an employee is subject always to the test of reasonableness under section C 58 (2) of the Labour Code. The question is whether the employer acted reasonably or unreasonably in dismissing the employee for the assigned reason under the circumstances which prevailed at the material time. That section provides:

> ***"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."***

13. Summary dismissal is a strong measure requiring strict, persuasive and convincing evidence which must be cogent and weighty in nature and content. Where an employer has dismissed an employee, the burden is on the employer to prove on a balance of probabilities, that the dismissal was not unfair.

14. In instances where a dismissal is held to be unfair by reason of the employer's failure to follow the correct procedure, the Court will consider to what extent, if any, the Employee contributed to his dismissal. In such situations a compensatory award to the employee may be reduced to take into account his contributory fault.

The Evidence

15. In his oral testimony the Employee admitted that with the assistance of others in the kitchen, he prepared personal food items on Saturday nights. However, he maintained that he did so only at the end of his shifts. He admitted using the Employer's oil which he said would be discarded soon afterwards during the customary clean-up process.

16. According to the Employee, the meeting on June 8, 2010 was all about his use of the oil. He said that after the meeting, on the basis of his admissions, he was told to go home, which he did. He said that he was called back to the Employer's premises on June 10, 2010 on which date his employment was summarily terminated.

17. Under cross-examination, the employee admitted that he regularly used the Employer's soon-to-be-discarded oil and its "fryer" on Saturday nights at the end of his shifts. About the oil, he said, "they were going to throw it away". He also said that from time to time, other members of staff would voluntarily assist him to fry his plantains.

18. The Employee also stressed that he had been working for the Employer since he was a youth. To him, the Employer was like family and as such he believed that they could have been more considerate and deal with him more leniently.

19. The Employee also recounted the occasion when Mr. Lewis approached him regarding what he overheard about the Employee preparing his own food in the Employer's kitchen. In response, he told Mr. Lewis that he had earlier received permission from Garolyn, the Employer's former Restaurant Manager.

20. In her testimony on behalf of the Employer, Ms. Georgiana James, the Employer's Human Resources Manager stated that she was the main witness for the Employer although her employment commenced in December 2015, years after the Employee had been dismissed. In her view, in light of the Employee's admission of wrong-doing, his dismissal was not unfair.

21. The Employer's second witness was Mr Kenneth Lewis, the Head Chef. He acknowledged that he had the authority to issue verbal and written warnings to the Employee. He said that if the matter required more serious attention he would refer it to the Human Resources Manager.

22. Mr. Lewis testified that he recalled telling the Employee that it was not right for him to be preparing his own food on the Employer's premises. However, he said that he did not issue a written warning. Moreover, Mr. Lewis said that he spoke to the Employee in that vein but did not issue a formal warning because of the good relationship between them. Moreover, Mr. Lewis also testified that the Employee told him that he had permission from "Garolyn" or "bigger heads". He made no enquiries to ascertain whether such permission had in fact been given.

23. In addition, Mr. Lewis said that during the several years he worked for the Employer between 1991 and 2012 there was a close relationship and good "comradery" between the Employer and its employees. He also recalled that the Employee had previously lent some "warmers" to the Employer.

24. Further, under cross-examination, Mr. Lewis said he was aware of the Employer's Handbook but he never referred or showed it to the Employee.

Resolving the Main Issue

25. In the letter of dismissal dated June 10, 2010, the Employer referred to "a report" that the Employee had been running his small catering business from the Employer's kitchen "for quite some time". The specific allegation was that on June 5, 2010 the Employee brought certain personal items into the kitchen and had his subordinates prepare them using the Employer's utensils and utilities.

26. During his oral testimony, the Employee admitted to the allegation regarding what happened on the 5th June, 2010 but said that he felt justified in doing so. Based on the evidence given by the Employee and Mr. Lewis, we made the following findings of fact which support the Employee's position:

    (a) There was a tacit arrangement in place whereby he would lend some of his equipment to the Employer in consideration of which, the Employer permitted him to use its facilities towards the preparation of his items for sale in his personal business.

    (b) He had earlier received general permission from "bigger heads", and in particular from "Garolyn" the Employer's former Restaurant Manager, to use the Employer's facilities as he did.

    (c) At the meeting on June 8, 2010, the Employee admitted to the allegation against him and explained the reasons for his action.

    (d) The oil which he used at the Employer's premises had been previously used by the Employer and was destined to be discarded the very night soon after he used it.

    (e) Given his services to the Employer since he was a "youth", there was in existence a close relationship between himself and the Employer whereby they treated each other like family and he would endeavor to assist the company whenever necessary.

    (f) During his tenure of over 18 years, he had a good record and had never been formally warned or written to about any allegation of misconduct.

    (g) He was not given a fair opportunity to be heard in his own defence at a proper disciplinary hearing.

    (h) The Disciplinary Code, exhibited at trial, and relied upon by the Employee, did not allow for his dismissal for the alleged offence. In fact, that code required the Employer to either warn or suspend him in the first instance where he had committed the offences of either the "unauthorized use of facilities" or "using business property-machinery and equipment for an unauthorized purpose."

    (i) There was no conflict of interest because the Employer did not carry on business on Sundays, the sole day on which he conducted his small business.

    (j) Contrary to what was alleged in the dismissal letter, there is no evidence before us that he deprived the Employer of any of "its substantial resources, both human and material, with impunity".

27. Whether the Employee's dismissal was unfair harsh or cruel must be determined on the basis of the relevant statutory provisions and the foregoing findings of fact. In particular, the test of reasonableness under section C 58 (2) must be applied.

28. It cannot be over-emphasized that we did not have the benefit of testimony from Garolyn and /or any of the "bigger heads". Moreover, our attention was not drawn by the Employer to any particular provision of the Collective agreement, the Employee's Handbook or the Disciplinary Code on which it relied to support its case.

29. We have noted above the Employer's obligation to prove its case by tendering evidence that is cogent and weighty in nature and content. The Employer has not discharged that obligation in these proceedings. Essentially, the evidence at trial pitted that of the Employee against Mr. Lewis. In certain important aspects, Mr. Lewis' testimony supports the Employee's contention that the dismissal was harsh.

30. Moreover, Mr. Lewis' evidence leads or tends to lead to the conclusion that the Employer tacitly accepted or condoned the employee's alleged misconduct. In light of repeated or extended reports or rumors of wrong-doing extending over several months, Mr. Lewis elected to issue no formal warning to the Employee but settled for mere "verbal warnings". In the circumstances, it is our opinion that a written warning should have been given to the Employee bringing it home to him that, given the previous verbal warnings, any recurrence of his misconduct would have led to his dismissal.

31. The test of reasonableness under Section C 58 (2) of the Labour Code requires us to consider the Employee's right to natural justice. In that regard, we are mindful that a denial of natural justice and procedural defects generally, by themselves, do not always render a dismissal unfair. However, in this instance, we are of the opinion that it was unreasonable for the Employer to summarily dismiss the Employee in the circumstances.

32. Accordingly, we find that the Employee was unfairly dismissed and he is entitled to compensation therefor.

33. However, in light of his admitted misconduct, we are of the opinion that the Employee contributed to his dismissal. As a result we assess his contribution to be 30% and will reduce his compensatory award accordingly.

34. In arriving at our conclusion, we were obliged to have regard to section 10 (3) of the Industrial Court Act which requires us to determine matters "… in accordance with equity, good conscience and the substantial merits of the case...having regard to the principles and practices of good industrial relations and the Antigua and Barbuda Labour Code"

The Award

35. We award compensation as follows:

    (a) Notice Pay
    Having received no notice, the Employee is entitled an amount at least equivalent to his periodic pay. We are mindful that the Employee was paid fortnightly. However, in this instance, we believe that an amount equivalent to one month's pay is reasonable. Accordingly, **we award the sum of $4,261.64**. (Fortnightly pay: $1966.91 x 26 / 12).

    (b) Loss of Protection
    The Employee worked for a period of 18 years and 9 months. Under this head he is entitled to the equivalent of severance pay. It is this Court's settled practice to award monthly paid workers at the rate of one month's pay per year of service. We are mindful that the Labour Code provides for payment at the rate of no less than the minimum prescribed therein. Having regard to all the circumstances, in our opinion, an award should be made at the settled rate for monthly paid workers. Given the Employee's monthly rate, **we award the sum of $79,905.75** (monthly pay: $4,261.64 x 18.75).

    (c) Immediate Loss
    We are not satisfied that the Employee made diligent efforts to find alternative employment after his dismissal. As a result, **we award the nominal sum of $8,523.28,** being the equivalent of two months' salary.

36. In the premises, **the total sum due to the Employee is $64,883. 47,** being 70% of the total award.

Order

37. It is ordered that:

    (1) The Employer shall pay to the Employee the sum of $64,883.47 as compensation for his unfair dismissal.

(2) Payment of the said sum must be made by 3 equal monthly installments of $21,627.82 commencing on 30th June, 2019.

Dated this day of May, 2019

Hon. Charlesworth O.D. Brown,
President

Hon. Hayden Thomas,
Member

Hon. Judith Dublin,
Member

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 56 of 2016

BETWEEN:

OTIS TEAGUE

Employee

and

ANTIGUA PUBLIC UTILITIES AUTHORITY

Employer

Before:
The Hon. Charlesworth O.D. Brown — President
The Hon. Samuel Aymer — Member
The Hon. Megan Samuel-Fields — Member

Appearances:
Mr. Samuel A. James and Simon Leonard of Antigua & Barbuda Free Trade Union, Representative for the Employee
Mrs. Karen A de Freitas-Rait of K.A. de Freitas-Rait Legal & Corporate Services Consulting, Attorney-at-Law for the Employer

2018: May 30
2019: May 08

JUDGMENT

Brown, P:

Background

1. The Public Utilities Authority, referred to in this Reference as Antigua Public Utilities Authority, is a body corporate established by the Public Utilities Act Cap.359 to provide electricity, water and telephone services in Antigua & Barbuda. It operates a plant, including an electricity power station, in Barbuda (the Premises) from which it conducts business on that island.

2. At all material times the Employee was the Supervisor at the Premises receiving a monthly salary of $4,800.00 and a responsibility allowance of $400.00. He had 28 years work experience and was the most senior employee deployed and resident on the island. As such, he was under the direct supervision of the Employer's Superintendent, Mr. Watley Rose, whose work base was in Antigua.

3. The Premises were completely fenced. Access was allowed through the main gate and /or two subsidiary gates. The Employee was in custody of or had direct access to the keys for the padlocks by which the gates were secured or opened from time to time.

4. On the 27th November, 2014 an "incident", described as a "protest action" or a "strike action" - which included or resulted in the lock-out of Mr. Rose and the shutdown of the Employer's generator - occurred on the Premises. Although he was in a position to do so, the Employee did not facilitate Mr. Rose's access to the Premises. As a result of the main entrance gate being locked, customers of the Employer were prevented from paying bills and conducting other business on the Premises for approximately one hour and a half. Ultimately, the "incident" culminated in an electrical "black-out" on the island on that night.

5. On the basis of the Employer's concern about the Employee's conduct and his role or participation in the "incident", he was first suspended by letter dated 27th November, 2014 for a period of 2 weeks to allow the Employer to conduct a full investigation. That suspension was extended on two occasions pending the completion of the investigation. Eventually, the Employee was dismissed by letter dated 27th January, 2015 after a suspension period of approximately 9 weeks.

6. The reasons for the Employee's dismissal are stated in the letter of dismissal, which is substantially reproduced as follows:

"27th January, 2015

Mr. Otis Teague
Codrington
Barbuda

Dear Mr. Teague,

This is to advise you that APUA has now completed its investigation into the events which occurred at the Barbuda Power Plant on 27 November, 2014, as they relate to you and your continuing suspension. Following are APUA's finding and decisions.

APUA is satisfied that you failed completely in your duties as a supervisor on 27 November, 2014 in that, when the gates to the APUA compound were unlawfully locked for approximately an hour and a half as part of an illegal employee protest:

(i) You failed to take any action to report the same to your immediate supervisor Mr. Rose or indeed to anyone in a position of authority at APUA.

(ii) You failed to make any or any reasonable effort to determine who had locked the gates, or else you knew who locked the gates but failed to disclose the identity of such person (s) and take appropriate action in respect of the same.

(iii) You failed to take any reasonable steps to have the gates re-opened.

(iv) You failed to call the police, or to take any other reasonable action to quell the protest and facilitate the resumption of ordinary business at the Plant.

(v) You refused to answer and/or failed to return several telephone calls from APUA management who tried to contact you during the protest.

(vi) You failed to take any or any sufficient interest in protecting APUA staff and property or in resolving the protest and treating it with appropriate urgency and seriousness.

By your own admission you stood by without raising a single, meaningful objection to the actions of the protestors. Your actions and omissions on that day are indicative of contempt for the authority of your immediate supervisor, Mr. Rose, and gross disregard for the management, staff and property of APUA. Further they have completely eroded the foundation of trust necessary to maintaining an

employment relationship. Such behaviour amounts to insubordination and serious misconduct which would, without more, justify termination of your employment.

However APUA is also satisfied that the said protest was largely orchestrated to benefit you personally, by attempting to coerce APUA into removing Mr. Rose from his then position and into promoting you to that position. Your silence and inaction in the face of a protest intended for your benefit either was or should have been reasonably expected by you to operate as tacit approval and encouragement of the protest actions. Such behaviour by you therefore very likely contributed to the continuation of the protest even after you were suspended from active duty late that day.

Further still, APUA has good reason to believe that you were actively involved in the protest and that you admitted in the presence of Mr. Rose and others to having personally been responsible for locking at least one of the gates. You were invited to a meeting on 21 January, 2015 to provide you with an opportunity to respond to such information gathered during the investigation. However, at that meeting, after taking the advice of your representative, you refused to answer any questions, and indicated that you did not wish to have any further discussion on the matter with APUA.

It is significant that as a consequence of the gates being locked some employees on the premises may have been unlawfully detained, while, on the other hand, Mr. Rose and some members of the public were refused or unable to gain access to the premises. Ultimately, the electricity generators were turned off by protestors that evening, causing an electrical "black-out" which lasted several hours and affected most of Barbuda.

In all the foregoing circumstances, APUA cannot reasonably be expected to continue an employment relationship with you. Your employment is therefore hereby terminated with immediate effect.

A cheque representing your salary up to and including 28th January, 2015 and unused vacation leave of sixty-five (65) days will be available for collection from Mr. Clinton Davis- Senior Supervisor or his designate at the Barbuda Power Station (BPS) on 28th January, 2015. Any outstanding loans or advances owed to APUA and/or APUA credit union will be deducted from your entitlements.

You are required to deliver, your APUA identification card, cell phone, all keys to APUA facilities, uniforms and any and all other APUA property in your possession to Mr. Davis prior to your cheque being released.

We extend wishes for better success in your future endeavours.

Sincerely,

……
Rodney Simon (Mr.)
Human Resource Manager
cc…"

7. Being dissatisfied with his dismissal, the Employee commenced these proceedings by filing the Reference on the 22nd September, 2016.

The Dispute

8. In his Memorandum of Claim filed on 22nd September 2016, the Employee contends that he was unfairly and constructively dismissed by reason of his extended suspension for approximately 9 weeks contrary to the limitation of 4 weeks stipulated in the definition of suspension in section B 3 of the Antigua & Barbuda Labour Code (the Labour Code). More specifically, the Employee pleaded that: "***The Company's violation of Division B 3 of the Labour Code amounted to a Constructive and direct dismissal."***

9. In the alternative, the Employee pleaded:

> ***"… if it is determined that the violation of B 3 of the Labour Code does not amount to an unfair dismissal then the substantive matter should be set up for trial."***

10. The Employee also pleaded that if the Employee was guilty of the alleged misconduct, which he denied, the Employer acted in breach of item No. 22 of the agreed Disciplinary Code as set out in the subsisting Collective Agreement between the parties. Under the Disciplinary Code, the only relevant offence was a failure to report damage to the Employer's property for which the maximum penalties permitted on the first two occurrences of such an offence were suspensions.

11. The Employer disputes the Employee's claim on three main grounds: Firstly, that the Employee's misconduct was so serious that it justified his summary dismissal. Moreover, the Employer contends that the consequences of the Employee's misconduct included a prolonged blackout on the island; a widespread disregard for the Employer's rules; a general disrespect for the established chain of command; and the usurpation of the Employer's property in Barbuda.

12. Secondly, the Employer maintained that there was no constructive dismissal of the Employee because the Employer committed no repudiatory breach of the contract of employment as the Employee continued to receive and accept his salary and other benefits for the entire period of his suspension.

13. Thirdly, the Employer asserted that section B 3, being a definition section only, does not mandate or prohibit any action by the Employer. Moreover, according to the Employer, the definition of suspension has no applicability in instances of "investigatory suspensions" and the determination of the proper length of the suspension should be guided by reasonableness in the circumstances.

The Main Issues

14. The four main issues arising in this Reference are:

    (1) Whether the suspension for the period exceeding 4 weeks resulted in the termination of the Employee's employment?
    (2) Whether the Employee was constructively dismissed?
    (3) Whether the Employee committed serious misconduct which rendered his continued employment untenable and justified his dismissal.
    (4) Whether the Employer acted reasonably or unreasonably in the circumstances when it dismissed the employee?

The Closing Submissions

15. In his closing submissions on behalf of the Employee, under the heading "the Law", Mr. James emphasized the definition of suspension and submitted that on or before the meeting to which the Employee was invited on January 21, 2015, the Employee had communicated to the Employer that he was no longer participating in the investigative process because he considered himself as having been dismissed.

16. Further, Mr. James submitted that, based on the contractual prohibition against suspending an employee without pay beyond 4 weeks, in the Appendix of the Collective Agreement, the maximum period for suspension with pay is also 4 weeks.

17. In addition, Mr. James submitted that the Employer not only unlawfully terminated the services of the Employee, it waived its right to do so because it failed to act within the four week period during which it was entitled to suspend him.

18. Ultimately, Mr. James submitted that, taking all things into consideration, the Employee was unfairly dismissed and should be compensated therefor. He cited the judgments of this Court in **Reference No. 23 of 2011 Berlinda Dowe v Carlisle Bay Resort** (the **Dowe case**) and **Reference No. 20 of 2012: Roy Hector v Colin Abbott t/a Abbotts Construction** (the **Hector case**).

19. In her closing submissions on behalf of the Employer, Learned Counsel highlighted the several admissions of the Employee that: he was part of the "protest action"; instead of opening the gates to allow his direct supervisor onto the premises he told him "we do not want you in the yard"; he was angry and disrespectful to his supervisor; and he continued to receive his salary and other benefits during the entire suspension period.

20. As to the credibility of the witnesses, Mrs. deFreitas-Rait submitted that the witnesses who testified on behalf of the Employer were more credible than the Employee. She noted that he was often evasive and contradictory. Learned Counsel also highlighted aspects of the uncontroverted evidence of the Employee's misconduct. She emphasized that:

the Employee locked out his supervisor; the power station was taken hostage; the Employer's customers were prevented from transacting their usual business; the Employee's conduct went beyond insubordination and raised concerns about violence and unruliness.

21. As to the Employee's claim of constructive dismissal, Counsel relied on the leading case of **Western Excavating (EEC) Ltd. v Sharp [1978] 1 All ER 713** (the **Western Excavating case)**, and submitted that even if the Employer was in breach of section B 3, which she denied, the Employee was not constructively dismissed. Mrs. deFreitas-Rait also submitted that there was and could be no breach of section B 3 and that even if there was, that breach did not constitute a repudiatory breach so as to ground the Employee's claim of constructive dismissal.

22. Learned Counsel also cited the landmark judgment in Suit No. 21 of 1993: **Universal Caribbean Establishment v James Harrison (**the **Harrison case)** and submitted that in the face of a mere definition of suspension, there was no statutory limit to the duration of an "investigatory suspension".

23. In addition, Counsel submitted that there was no breach of the Disciplinary Code in the Collective Agreement and that the duration of the investigatory suspension was reasonable in all the circumstances.

Issue 1: Section B 3 – Suspension

24. In considering the meaning and significance of "suspension" in the Labour Code, we rely on settled principles of interpretation. For that purpose, we rely on the **4th Edition of Halsbury's Laws of England. Volume 44** (**Halsbury's**), at paragraph 863 of which**,** the learned authors state a cardinal rule of the construction of statutory provisions as follows:

> ***"863. Primary meaning to be followed. If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning."***

25. In relation to interpretation sections, at paragraph 845, the learned authors assert that:
> ***"845. Interpretation sections. …In the construction of an interpretation section it must be presumed that Parliament has been specially precise and careful in its choice of language, so that the rule that words are to be interpreted according to their ordinary and natural meaning carries special weight"***

26. Having stated those rules of interpretation, we note that the definition of suspension was introduced to Interpretation Section of the Labour Code by section 4 of the Antigua & Barbuda Labour Code (Amendment) Act. No 16 of 1998 (the 1998 Amendment). The amendment was passed over 22 years after the Labour Code was first enacted in 1975. Section 4 of the 1998 Amendment provides:

> ***"4. Section B 3 of the principle Act is amended by inserting immediately after the definition of the words "severance pay" appearing therein the following-***
>
> ***"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."***

27. As expressed in Section B 3, a "***suspension"*** may arise "***as a penalty or pending investigation of the employee's alleged misconduct."*** As we understand the definition, a suspension may be grounded on either punitive or investigative motives. Each of the two categories may be either with pay or without pay. As a result, there are in fact four distinct types:

    a. A punitive suspension with pay;
    b. A punitive suspension without pay;
    c. An investigative suspension with pay; and
    d. An investigative suspension without pay.

    Clearly, the definition concisely identifies the four types seamlessly and states a single maximum period of 4 weeks.

28. Parliament passed the 1998 Amendment knowing that the only use of the term ***"suspension"*** was in Section C 59 (2) which provided that ***"suspension without pay"*** was a legitimate form of disciplinary action where an employee was guilty of misconduct. There was no distinction between suspension as a ***"penalty"*** and suspension ***"pending investigation".*** And there was no mention of suspension with pay.

29. In the circumstances, learned Counsel argued that the introduction of the definition of suspension in 1998 was merely intended to limit the suspension period under the pre-existing subsection C 59 (2). She submitted that in the absence of any explanatory, qualifying or other substantive provisions imposing a penalty for its breach, the definition is of very limited and narrow application and does not extend to investigative suspensions. We will now consider that proposition.

30. Giving the words in the definition their ordinary meaning, we are constrained by them and must look elsewhere in the Labour Code, construe it as a whole and attempt to glean the true and full import of the definition. To that end, we will put the definition in the context of the other provisions of the Labour Code and consider the other relevant sections in which the term suspension is used.

31. In relation to the construction of statute as a whole, we will rely on the following authoritative assertions of the authors of **Halsbury's:**

> ***"872. Statute to be construed as a whole. ... For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.***
>
> ***"Thus a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute…."***

We note that reliance was placed on that paragraph by the Court of Appeal in the landmark judgment in Suit No. 21 of 1993: **Universal Caribbean Establishment v James Harrison.** Naturally, we will be guided by that approach.

32. Importantly, we observe that, apart from introducing the definition in section B 3, the 1998 Amendment also effected amendments to sections B 9, B 12 (1) (b) and C 59 (2). The pre-existing provisions of those sections provided:

"B 9 (1) Any question, petition, charge or complaint concerning severance pay as covered by Part 4 of Division C hereof, concerning alleged unfair dismissals as covered by Part 5 of Division C hereof, representation questions as covered by Division J hereof or infringements as covered by Part 1 of Division K hereof, which shall have been referred for formal handling as provided in section B 6 (2) (c), herein, shall be heard and determined by a Hearing Officer".

"B 12 (1) (b) in an unfair dismissal matter, he may order the payment of a sum of money equal to loss of wages sustained and, in addition thereto he may also order the reinstatement of the person dismissed or the payment of a sum of money in lieu of such instatement;"

"C 59 (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 repetition; which action may include suspension without pay for such period as may be specified in the written warning; and, thereafter, if the employee is, within 6 months following receipt of the written warning, guilty of misconduct in or in relation to his work which is the same or substantially the same as the misconduct in respect of which the written warning was given, the employer may terminate the employment of said employee or take such other action as may have been specified in the written warning."

33. Sections 5, 6 and 19 of the 1998 Amendment provide:
"5. Section B 9 of the principal Act is hereby amended in subsection (1) by the insertion immediately after the word 'dismissals' appearing therein line 3 of the words "or suspension"

> ***"6. Section B 12 of the principal Act is amended in subsection by the repeal of paragraph (b) and by the substitution thereof of the following-***
>
> ***(b)in an unfair dismissal or suspension without pay matter, he may order the payment of a sum of money equal to loss of wages sustained and, in addition thereto he may also order the re-instatement or restoration of the person dismissed or suspended, or the payment of a sum of money in lieu of such reinstatement".***

"19. Section C 59 of the principal Act is amended as follows-

(a) by the repeal of subsection (2) and the substitution therefor of the following:

'(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.

(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.

(4) Where, within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning."

34. It is clear that the 1998 Amendment significantly broadened the scope of complaints to include one of "unfair suspension without pay" under section B 12 (1) (b), as amended. It is clear that quite separate and apart from complaints of unfair dismissal, there now exists a new category of complaints of "unfair suspension" in cases of suspension without pay.

35. Further, we note that section C 59 (2) as amended, deals with situations where the misconduct of which an employee is guilty is not serious enough to warrant summary dismissal under C 59 (1). In such situations, the subsection provides for a warning, stipulating the action the employer intends to take in the event of the occurrence of the same or similar type of misconduct.

36. Section C 59 (1) provides that an employer may summarily dismiss an employee who is guilty of serious misconduct:

" C 59 (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
(d) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
(e) …
(f) …."

37. Section C 59 (2), as amended, provides for a warning to be given to the employee where C 59 (1) does not apply.

"C 59 (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."

38. Like subsection (2) before the 1998 Amendment, the newly added subsection (3) expressly provides for "suspension without pay" as a penalty for misconduct.

"C 59 (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."

Clearly, there is no limit on the suspension period expressed in that subsection.

39. Subsection (4) limits the time period to 6 months within which the employer may terminate the employment of, or (by implication) suspend the employee if he is guilty of misconduct as serious as that for which he was warned.

> ***"C 59 (4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning."***

40. Accordingly, the definition of suspension is relevant not only to disciplinary action under Section C 59 (2) (3) and (4) but is also relevant to complaints of unfair suspension without pay, under section B 12 (1) (b). There is no mention of or express reference to "suspension with pay" or "investigative suspension" in any of those subsections.

41. The remedies for unfair dismissal are well settled. They range from reinstatement to compensatory and punitive awards. The remedy for an unfair suspension without pay is "***the payment of a sum of money equal to the loss of wages sustained and in addition thereto… the reinstatement or restoration of the person… suspended, or the payment of a sum of money in lieu of such reinstatement."***

42. In our opinion, the result of the foregoing is that, in so far as suspension without pay under section C 59, as amended, is concerned, the pertinent subsections must be read within the limitations of the definition of suspension under section B 3. The definition operates to place an obligation on the employer to limit a suspension without pay to no more than 4 weeks. From the employee's perspective, the definition operates to establish a right not to be suspended without pay for a period in excess of 4 weeks. The remedy for the breach of that right is established under section B 12 (1) *(b).*

43. In the circumstances, we do not agree with Counsel's submission that the effect of the definition in Section B 3 should be limited to that Division of the Labour Code. Moreover, the effect of the definition should not be restricted to punitive suspensions. In our view, the definition applies to all types of situations where an employee is suspended without pay either as a definitive final penalty or as an intermediate step pending further action by the employer after its investigation. Accordingly, we decline to treat an "investigative suspension" as a separate category which could extend beyond 4 weeks.

44. However, we find that statutory lacunae exist in relation to "investigative suspensions" and "suspensions with pay". It is not within our purview to attempt to fill the void. However, we have to do our best to avoid inconsistency, repugnancy or absurdity in the definition in order to make the Labour Code operative as a whole. In that vein, we redirect our attention to consider the effect of the statutory provisions vis-a vis the fundamental contractual rights of the parties under the employment contract.

45. At paragraph 904 of **Halsbury's**, under the heading: **"*Statutes affecting existing Rights and Principles of Law"*** the learned authors assert:

> *"**904. … Except insofar as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law…"***

46. At common law, there are certain terms which are necessarily implied in order to give efficacy to the contract of employment. In the circumstances, we turn our attention to the common law as an aid to the construction of the Labour Code. It is no secret that the new rights created by the Labour Code have their foundations in the common law.

47. In our opinion, the definition of suspension implies that, at common law, an employer is empowered to suspend an employee "***with or without pay***" and ***"as a penalty or pending investigation"***. That implied power arises from and does not extinguish common law rights based on established principles of law. There are, for example, implied obligations on the employer not to breach the common law implied term of ***reasonableness*** or that of ***trust and***

confidence. A breach of any one of those implied terms may constitute repudiatory conduct on the part of the employer which may lead to a constructive and unfair dismissal.

48. In our opinion, unless there are reasonable grounds for the imposition of a punitive or investigative suspension and the continuance thereof beyond 4 weeks, such a suspension is likely to constitute repudiatory conduct and probably lead to a finding of constructive and unfair dismissal. In other words, in situations where investigative suspensions and suspensions with pay in excess of 4 weeks are imposed, the outcome of a complaint challenging such a suspension or alleging a constructive and unfair dismissal will turn on whether or not there was a breach of one or both of those common law implied terms.

49. There is no provision in the Labour Code creating a direct causal link between a suspension without pay exceeding 4 weeks and a constructive or unfair dismissal. An employer's failure to keep a suspension to no more than 4 weeks may result in a valid claim of unfair suspension, especially where the suspension is without pay. In other situations, such a breach may be considered as part of the overall circumstances of a particular case and may ground a claim of constructive dismissal. Alternatively, it may become a critical aspect of the statutory test of the employer's reasonableness or unreasonableness in the particular circumstances. In the further alternative, it may amount to a breach of the common law implied term of ***reasonableness*** and /or that of ***trust and confidence.***

50. Thus, in our opinion, a breach of the limitation period of suspension does not automatically result in the termination of the contract of employment. However, there may be instances where a punitive suspension without pay under section 59 (3) in excess of 4 weeks could constitute the basis for a successful claim of constructive dismissal. The same logic applies to investigative suspensions with pay, as in this instance. Each case turns on its own facts, as demonstrated in the **Dowe case and** the **Hector case.**

51. In the **Dowe case,** the employer suspended the employee <u>without pay</u> for a period exceeding 4 weeks while it awaited the outcome of criminal proceedings against her in the Magistrate's Court. After a detailed analysis of the law and the facts, this Court, as then constituted, held that:

    - The employer owed a duty to the employee not to suspend her for more than 4 weeks.
    - The employer breached that duty when it suspend the employee indefinitely.
    - A breach of the employee's right not to be suspended beyond 4 weeks "created a remedy which crystallized" into her claim of unfair dismissal.

52. In that Reference, this Court then went on to discuss two issues: (a) whether the employee was guilty of misconduct; and (b) whether the employer acted reasonably or unreasonably. At the end of the day, it was held that the Employee was not guilty of misconduct under section C 58 (1) and that the employer acted unreasonably under section C 58 (2). Accordingly, it was determined that employee was unfairly dismissed.

53. In the **Hector case,** the employee was also suspended <u>without pay</u> for an indefinite period. After consideration of the facts and the law**,** this Court held that:
    - Having effected a suspension for an indefinite period, the employer had a duty to ensure that it did not go beyond the statutory limit of 4 weeks.
    - The suspension for an indefinite period which exceeded 4 weeks amounted to an unfair suspension.
    - On the 29th day after the start of the suspension, the employee's employment was effectively terminated.

    In that Reference, this Court went on to consider whether that termination, in the circumstances, could constitute a proper temporary termination of the employee's employment under section C 42 of the Labour Code. In the final analysis, upon consideration of the alleged misconduct of the employee under section C 58 (1) and the application of the test of reasonableness under section C 58 (2), it was held that the employee was unfairly dismissed.

54. Both the **Dowe** and the **Abbott** cases are easily distinguished from this Reference. Both of those involved punitive suspensions without pay and not investigative suspensions where the employers were actively pursuing investigations. However, most importantly, on each occasion this Court went beyond the issue of the length of the suspension period, considered the alleged misconduct and applied the statutory test of reasonableness.
55. Given the limited statutory provisions, and the facts of this case, we are constrained to conclude that after the fourth week of suspension, the Employee was no longer on suspension as defined in section B 3 of the Labour Code. As

such, he was entitled to return to work on the day immediately after the expiration of the first 4 weeks of his suspension. And the remedy available to him at that stage would have been an order restoring or reinstating him to the situation immediately before the suspension and compensating him for any loss suffered.

56. On the facts of this case, we also conclude that important aspects of the employment relationship subsisted beyond 4 weeks of the statutory suspension period. In the circumstances, the contract of employment was not frustrated or otherwise terminated by the operation of Section B 3 of the Act. In that regard, the evidence is clear: there was no termination of the employment contract as the Employer tendered and the Employee accepted his salary and other benefits during the extended suspension period. The Employee also participated as an employee in at least two interview sessions with the Employer during the suspension period.

57. We now turn our attention to the question as to whether the protracted suspension beyond the statutory limit "crystalized" into a constructive or unfair dismissal.

Issue 2: Constructive Dismissal

58. As to issue No. 2, we first consider the nature of constructive dismissal. As correctly pointed out by Counsel, the concept of constructive dismissal is inherently grounded on the contractual relationship between an employer and employee. Without repeating the quotation of the dicta of Lord Denning in **Western Excavating** case, on which Counsel relied, it will suffice to say that constructive dismissal originates from conduct of the employer which goes to the root of the contract of employment and entitles the employee to treat himself as being wholly discharged from any further performance under it. Thus, the genesis of a claim of constructive dismissal is not the express statutory provisions of the Labour Code but rather the applicable fundamental principles of common law.

59. However, there are certain obligations on the employee who wishes to pursue a claim of constructive dismissal. This Court considered the concept of constructive dismissal in several cases including Reference No. 35 of 2012: **Wayne Weaver v. St. James Club**. In that case, at paragraph 70 of the judgment, this Court determined that there are 4 essential requirements for a successful claim of constructive dismissal. It was held that:

> ***"… a constructive dismissal will be fully constituted when:***
>
> ***(1) The conduct is such that it demonstrates that the Employer no longer intends to be bound by the contract of employment;***
> ***(2) The repudiatory conduct must be such that it undermines or erodes or destroys the contractual relationship;***
> ***(3) The employee's response to the employer's repudiatory breach is directly referable to the employer's conduct;***
> ***(4) The employee must get his timing right. He must not work too long after the breach and must not conduct himself in such a way as to waive his right and thereby affirm the contract;"***

60. In the premises, Counsel's submissions on this issue find favour with us. More specifically, we find that :

(a) There was no repudiatory breach on the part of the Employer of either the implied term of ***reasonableness*** or the implied term of ***trust and confidence***. The Employer continued to pay the Employee his full salary, maintained contact with him and updated him on progress during the investigation process. The Employee did not resist or object to the Employer's continued treatment of him as its employee.

(b) The Employee did not either resign or make a clear and unequivocal declaration that he treated the suspension beyond the statutory limit as a repudiatory breach of the contract. To the contrary, the Employee continued to accept his salary and other benefits from the Employer and continued to communicate with it on several occasions during the suspension period. The evidence discloses no clear and unequivocal notice by the Employee to the Employer that he accepted the latter's conduct as a repudiatory breach of the contract of employment.

(c) In the totality of the circumstances, the employment contract was not undermined, eroded or destroyed although the suspension went beyond the statutory limit.

(d) The Employee did not get his timing right. He continued to treat himself as the Employer's employee for too long after the expiration of the statutory suspension period. In communicating through his union representative

that he would no longer participate in the investigation process was too, little too late. In the circumstances, the Employee affirmed the contract of employment subsequent to the expiration of the first 4 weeks of the suspension.

61. In the final analysis in respect of this issue, we find that there was no constructive dismissal.

Issue 3: Serious Misconduct

62. Although serious misconduct is not defined or circumscribed in the Labour Code, it is well settled that it is similar, if not identical, to gross misconduct as understood at common law. In that regard, **Black's Law Dictionary 10th Edition** defines "misconduct", "gross misconduct in the workplace", "willful misconduct of an employee", and "serious and willful misconduct" as follows:

> ***"Misconduct – A dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust."***
>
> ***"Gross misconduct in the workplace – Intentional or reckless behavior that might harm someone, esp. a fellow employee, or the employer. Gross misconduct may include acts in disregard of the safety of others, unlawful discrimination, libel, harassment, and various criminal offenses."***
>
> ***"Willful misconduct of an employee – The deliberate disregard by an employee of the employer's interests, including its work rules and standards of conduct, justifying a denial of unemployment compensation if the employee is terminated for the misconduct."***
>
> ***"Serious and willful misconduct – An intentional act performed with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."***

63. Section C58 (1) of the Labour Code conditionally provides that misconduct may properly constitute a good cause for dismissal. The primary condition is that there must be a factual basis for that assigned reason. Moreover, the assignment of misconduct as a good cause for dismissal is subject to the limitations imposed by Section C59.

> ***"C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor***
>
> ***(f) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);***
> ***(g) …***
> ***(h) …***
> ***(i) …***
> ***(j) …***
>
> ***Provided, however, that there is a factual basis for the assigned reason.***

64. The factual bases for the Employer's conclusion that the Employee is guilty of serious misconduct, are summarized in the dismissal letter set out at paragraph 6 above. In her closing submission, Counsel for the Employer highlighted the Employee's role in locking out or allowing the lock out of the Superintendent his supervisor, Mr. Rose. Counsel also highlighted the effect of preventing customers from transacting their usual business on the Employer's premises. Moreover, she referred to the threat of and the occurrence of a full electricity black-out in the whole of Barbuda.

65. It is not in dispute that the Employee was the most senior resident employee and officer-in-charge of the Employer's operations in Barbuda on a day-to-day basis. Counsel submitted that by virtue of his seniority he had a special responsibility to prevent, limit or stop the "unruly situation" which he failed to do. We agree.

66. For completeness, we note in passing that substantial portions of the Employee's evidence are less than credible. In the circumstances, needless to say, wherever material differences arise between the Employee's evidence and that given on behalf of the Employer, we prefer the latter.

67. At the end of the day, based on the evidence as a whole and several admissions of the Employee, in particular, we are persuaded by Counsel's submissions on this issue. Accordingly, from the perspective of any of **Black's** definitions of misconduct, we find that the Employee is guilty of serious misconduct, which, subject to the test of reasonableness, could successfully ground his dismissal under Section C59 (1) of the Labour Code.

Issue 4: Reasonableness

68. There is no doubt that, notwithstanding the existence of any potentially good cause for dismissal, the ultimate statutory test as to whether a dismissal is unfair is whether the Employer acted reasonably or unreasonably in the circumstances. In that regard, Section C58 (2) provides:

> ***"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."***

69. The inherent components of the statutory reasonableness test arise from and include aspects of natural justice at common law such as the requirements for:

(a) An open, full and impartial fact-finding investigation.
(b) A statement of the allegations against the accused with an opportunity to be heard in the presence of his accusers.
(c) The adherence to a proper procedure under a collective agreement and/or as dictated by statute.

70. It is well settled in case law that the absence of a fair hearing does not necessarily render a dismissal unfair. These are instances where an employee's conduct is so egregious in nature and well-grounded in fact that a fair hearing would make no difference. Although this may be one such instance, we will consider each of the three aspects of natural justice noted above.

71. At the onset, without repeating details of their testimonies, it will suffice to say that we find Mr. Rose, Mr. Nicholas, Mr. Simon and Mr. Clarke, the Employer's Superintendent, Chief Mechanical Engineer, Human Resources Manager and Labour/Employee Relations Officer respectively, to be credible witnesses. We have no doubt that the Employer carried out a comprehensive investigation on the basis of which it formed its views about the Employee's conduct. As to the duration of the investigation, we have taken into consideration the fact that the incident occurred in Barbuda, which automatically gave rise to logistical challenges. At the end of the day, based on both the statutory provisions and the common law, we are satisfied that that the Employer acted reasonably and carried out a proper investigation.

72. As to knowing what was alleged against him, we find that by reason of the letters written to him, especially that dated 12th January 2015, the two interviews to which he was subjected in November and December 2014, and the meeting which he attended on 21st January, 2015, the Employee knew substantially what was alleged against him.

73. As to a fair hearing, we are satisfied that at least the meeting convened on 21st January, 2015 provided the Employee reasonable opportunity to be heard in his own defence. In our opinion, in the circumstances, it was not necessary for the Employer to label that meeting a "disciplinary hearing" or to carry out any particular related form of procedure.

74. As to the Collective Agreement, the Employee's reliance on aspects of the agreed Disciplinary Code is misguided. The categories and types of misconduct cannot be exhaustively listed in any one document, much less in the Disciplinary Code. It is not surprising that item No. 35 is stated as it is ***"any other serious misconduct by an employee … not previously defined…".*** Moreover, as stipulated in Agreement ***"the Authority reserves the right to treat any offence on the merit of the particular case"***. We adopt Counsel's submission in that regard: what constitutes reasonable disciplinary action in a particular case must be determined on the facts of that case.

75. Finally on this issue, we find that there was no breach of the principles of natural justice of such magnitude, or at all, to render the dismissal procedurally unfair. Moreover, we find no instance of breach of the Disciplinary Code or other unreasonable action contrary to the Collective Agreement, or otherwise, on the part of the Employer. In short, the Employer passed the test of reasonableness.

Conclusion

76. For reasons stated above we find that notwithstanding the protraction of the suspension, there was no constructive dismissal. The Employer acted reasonably on the basis of the Employee established serious misconduct and properly effected the dismissal by letter dated 27th January, 2015. The Employer was entitled to conclude, as it did, that the

Employee's conduct eroded the foundation of trust and confidence necessary for the maintenance the employment relationship. And the Employer could not reasonably be expected to continue that relationship.

77. In the premises, the Employee's claim of constructive and/or unfair dismissal is dismissed with no order as to costs.

Dated the day of May, 2019

Hon. Charlesworth O.D. Brown,
President

Hon. Samuel Aymer,
Member

Hon. Megan Samuel-Fields,
Member