

IN THE SUPREME COURT OF BELIZE, A. D. 2012

CLAIM NO. 320 OF 2012

BETWEEN: (JULIO RAMON GONGORA JR. CLAIMANT
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(BELIZE SUGAR INDUSTRIES LIMITED DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Magali Marin Young, SC, of Magali Marin Young & Co. for the Claimant
Mrs. Deshawn Arzu Torres and Mrs. Pamela Watson of Young's Law Firm for the Defendant

Hearing Dates: February 3rd 2015
February 4th 2015
March 6th, 2015
December 17th, 2015

D E C I S I O N

The Facts

1. On Friday, March 2nd, 2012 Mr. Julio Gongora arrived on his motorcycle at Belize Sugar Industries Ltd. (BSI) where he had been employed since July 1st, 1981, parked the motorcycle and proceeded to sit under a shed. He appeared to other BSI employees to be in a disoriented state, dishevelled and wearing short pants, ordinary tennis shoes and no safety hat. Mr. Gongora was an Electrical and Instrumentation Technician responsible for calibrating sensitive pressurized company equipment at BSI. Mr. Gongora was asked by the Shift Superintendent Mark Chavarria to meet with his superiors and the Factory Manager John Gillett who after observing Mr. Gongora's condition, called the Police when Mr. Gongora insisted on riding his motorcycle home. When Police Sgt. Jones arrived he also observed the condition of the Claimant and

asked him to hand over the keys of the motorcycle, which he did. Mr. Gongora (at trial) claimed that he was not intoxicated and that he did not go to BSI to work on that day; he said he merely went to BSI to arrange for someone else to take over his shift as he was not feeling well. Police Sgt. Jones escorted the BSI vehicle which took Mr. Gongora home. On March 6th, 2012 BSI issued a letter of termination to Mr. Gongora citing a breach of BSI's strict policy on substance abuse amounting to egregious misconduct and detailing the dangerous (and potentially fatal) impact of such misconduct on the safety of the individual, employees, plant and equipment of BSI. It is against this decision that this Claim is brought, as Mr. Gongora seeks re-instatement to his post as an Electrical and Instrumentation Technician, or in the alternative damages for unlawful dismissal or wrongful dismissal. During his early years with BSI as an hourly paid worker, Mr. Gongora was very active in the Belize Workers Union (BWU), eventually rising to the ranks of President of the Union in 2011. Upon his promotion to staff Mr. Gongora relinquished his position as Union Leader but he continued paying his dues to the union and considered himself a member. Mr. Gongora claims that BSI promoted him to permanent staff, then terminated him wrongfully or unlawfully as a form of "*union-busting*" and in breach of the Collective Bargaining Agreement and Labour Act of Belize.

2. The Issues

(i) Was Mr. Gongora intoxicated at the time he entered the BSI compound on the 2nd March, 2012? If so, did he breach BSI's policy on substance abuse?

(ii) Did that breach entitle BSI to terminate Gongora's employment summarily under the Labour Act?

(iii) Is Mr. Gongora entitled to relief (reinstatement or damages)?

The parties have joined issue on almost every aspect of this case so these issues are of necessity a mixture of fact and of law and the Court now determines each issue in turn in resolving this claim.

3. (i) *Whether Mr. Gongora was intoxicated at the time he entered the BSI compound on March 12th, 2012, and if he was intoxicated, whether he breached BSI's policy on substance abuse.*

Mr. Gongora's evidence is that he came to BSI compound on March 2nd, 2012 to seek a replacement worker for his shift for the shift period 3:00 pm to 11:00 pm because he was not feeling well. He said that he did not come to BSI to work on that day and that is why he was not dressed in his customary working gear of hard hat, jeans, steel-toe boots. He said he knew he could not work as he was not feeling well so he simply came to BSI to make alternative arrangements and to report that he could not work. He said that he had had a tentative verbal arrangement with one Kenny Gillett, a co-worker, for a change of shift for March 3rd, 2012 which was to be confirmed by Mr. Gillett when he met at 3:00 pm on March 2nd, 2012 at BSI compound. Mr. Gongora claims that he wanted to ask Mr. Gillett to work the 3:00 pm to 11:00 pm shift instead on March 2nd, 2012 but he did not find Mr. Gillett on the compound that day. Mr. Gongora further testified that another co-worker informed the Shift Supervisor Mr. Mark Chavarria that Mr. Gongora was not well, and Mr. Chavarria then arranged for another technician Jose Manuel Baeza to work Gongora's shift. Mr. Chavarria then told Mr. Gongora that he would work for Baeza another time; he was also told that he could go home for the day. Mr. Gongora said he went to use the restroom then went to sit under a shed to tie his tennis shoe and to get ready to go back home. While sitting, the Chief of BSI Security came to him and asked him to go and meet with the BSI Factory Manager, Mr. John Gillett. At that meeting, the Factory Manager accused Mr. Gongora of being drunk, directed him to go home, called the police and the police came and took the keys to his motorcycle from him. Mr. Gongora said he was not given any type of test by the police. He claims that he was simply not feeling well but he was not drunk.

4. Several witnesses were called by the Defendant to attest to the condition that Mr. Gongora was in, and all concluded that he was in fact intoxicated on the job site at the time of his shift. Under cross-examination, Lyle Tillett, the Chief Security Officer for BSI said that Mr. Gongora *"appeared to be in a trance, turning his head from side to*

side in a confused state” and when he rose to his feet he *“staggered”*. The witness also said Mr. Gongora smelt of alcohol, and stated he (Tillett) used to be a drinker so he knows what alcohol smelt like. Mr. Lyle Tillett also testified that this was not the first time Mr. Gongora had shown up for work drunk and that he had personally warned Mr. Gongora against such behaviour in the past. He also said that upon seeing the Factory Manager, Mr. Gongora uttered the words *“John, a nice up”* which is a colloquial expression meaning intoxicated or high. Sgt. Jones explained that when he was called to the scene he was not able to compel Mr. Gongora to take a test for alcohol as Mr. Gongora was not driving at the time. However, the police officer observed that Mr. Gongora had *“blurred speech”* and was *“staggering”* and after discussions with the Factory Manager on Mr. Gongora’s apparent state of intoxication, Sgt. Jones demanded the keys to his motorcycle from him as he concluded Mr. Gongora was too intoxicated to drive home. Mr. John Gillett, Factory Manager also stated that he observed Mr. Gongora that day and he saw that *“his words were slurred, he was unsteady on his feet and he smelled of alcohol.”* Mr. Gongora told him *“John, a nice up”*. Upon seeing the condition of Mr. Gongora, Mr. Gillett called the police in the interest of safety as Mr. Gongora was insisting on riding his motorcycle back home, after he was informed he would not be allowed to work in that condition. Finally, there was the witness Jose Baeza, another Electrical and Instrumentation Technician who was working that day and had been waiting for Mr. Gongora to take over from him. He too observed that when Mr. Gongora arrived, he was not dressed for work and was staggering.

5. While it is true that there is no evidence of a drug test that would determine the issue of intoxication beyond a reasonable doubt, I find on a balance of probabilities on the evidence before me that the Claimant was heavily intoxicated when he arrived on the BSI compound that day, to the point where he could barely walk, i.e., *“staggering”*. All the witnesses who testified as to Mr. Gongora’s condition did so after observing him for a period of time. Those witnesses who were BSI employees had known Mr. Gongora and interacted with him personally for a considerable number of years prior to this incident, as they were all long standing employees of the company, and Mr. Gongora

had been employed with BSI since 1981. He was no stranger to them. As counsel for the Defendant Mrs. Arzu Torres rightly pointed out in her submissions, Mr. Gongora himself stated to the Factory Manager, “*John, a nice up*” and this statement was not denied by him in evidence. This is a colloquial expression in Belize which clearly refers to a state of intoxication (mainly due to excessive alcohol intake), and these words clearly demonstrate to my mind that Mr. Gongora *knew* for a fact that he was drunk. I therefore find that Mr. Gongora, knowing he was drunk, went to BSI compound in a drunken state at a time he was required to work his shift. I also accept as true the evidence of Mr. Kenrick Gillett, Electrical and Instrumentation Technician that Mr. Gongora called him the following day and asked him to lie on his behalf. Mr. Gongora wanted Mr. Gillett to say that they had a tentative arrangement that Gillett was to work for Gongora on March 2nd, 2012. Mr. Gillett stated that the only shift change he agreed to or discussed was for Sunday March 4th and so he refused to lie for Mr. Gongora. This behaviour on the part of Mr. Gongora was in my view reprehensible, and I find that BSI was quite right in finding him guilty of misconduct. I do not believe and I reject Mr. Gongora’s explanation that he just came to work on that day to arrange a change of shift. I am fortified in this view because I believe Mr. Lyle Tillett’s testimony that he had verbally warned Mr. Gongora about showing up for work under the influence of alcohol on more than one occasion in the past. Mr. Tillett testified that he gave Mr. Gongora prior chances to correct this behaviour, but in my view Mr. Gongora had gotten away unscathed so he did it again... one time too many.

6. I find that this behaviour on the part of Mr. Gongora was clearly a breach of BSI’s strict Corporate Policy against Substance Abuse which states in Clause 1:

*“The use, sale, possession, dispensation, manufacture, or transfer of any controlled substance, or drug related paraphernalia, at any time, at the workplace and/or on the job by an employee will constitute grounds for **immediate dismissal**. When any of the above offences are committed by the employee while at work, the incident will be reported to the police.”*

At Clause 2 the company reiterates its position that:

“Employees are required to report to work free from the influence of drugs or alcohol and that the unauthorised use of alcohol on Company property or being at work under the influence of drugs or alcohol is strictly prohibited. Failure to comply will result in disciplinary action being taken.”

The policy then goes on to state that the Company encourages employees to seek treatment for alcohol and drug problems. However, it is clear from the import of these provisions that the Company leaves the onus on the employee to first seek treatment for alcohol and drug related problems. Once the employee seeks treatment, then the Company will assist him in getting that treatment. This is understandable as assistance and treatment by the Company cannot be imposed upon an unwilling employee. In many instances, employees might be unwilling to admit that they have a problem, choosing instead to take risks and hide their issues for fear of possible repercussions on their jobs. I find that Mr. Gongora breached BSI’s policy on drugs and alcohol by showing up to work his shift while under the influence of alcohol.

7. (ii) *Did that breach entitle BSI to terminate Gongora’s employment summarily under the Labour Act?*

As rightly submitted by Mrs. Arzu Torres for the Defendant Company, section 41 and section 43 of the Labour Act lists circumstances in which an employee may be terminated for good and sufficient cause.

“41(1) Notwithstanding the foregoing provisions of this Part, and employer may dismiss the worker or the worker may abandon service of the employer, without giving notice and without liability to make payment as provided in sections 37 to 40 or section 183 if there is good and sufficient cause for such dismissal or abandonment of service:

Provided that an employer may not set up as a good and sufficient cause that the worker at the time of the dismissal was a member of a trade union.

(2) For the purpose of subsection (1) good and sufficient cause for dismissal without giving notice shall include dismissal

(a) when an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the express or implied conditions of his contract of employment;

(b) by wilful disobedience to lawful orders given by the employer;

(c) for lack of skill which the worker expressly or by implication warrants himself to possess;

(d) for habitual or substantial neglect of his duties;

(e) for absence from work without permission of the employer or without other reasonable excuse.

Section 43(1) An employer is entitled to dismiss summarily without notice or without payment of any severance or redundancy allowance or terminal benefit, any worker who commits an act of gross misconduct.

(2) The gross misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment relationship and has a detrimental effect on the business and is based on the operational requirements of the enterprise of such a nature that it would be unreasonable to require the employer to continue the employment relationship.”

The evidence of Mr. Paul Hough as to the precise and delicate nature of the Claimant’s work at BSI as an Electrical and Instrumentation Technician was highly detailed and very persuasive, and was not challenged by the Claimant:

“12. A person in that condition could not function safely or effectively in the role of Instrumentation Technician given the high risk of damage to equipment and injury to personnel and the consequential exposure of the operations to risk. The role of Instrumentation Technician was filled as a key technical staff appointment because the job requires good technical culpability, and a level-headed responsible approach to work.

13. The Instrument Technician is required to troubleshoot, calibrate, adjust and maintain a range of sensitive process control equipment, will be required to work unsupervised and be capable of dealing with a range of technical problems. Control and instrumentation equipment is used among other things, to protect personnel from the serious consequences of over-pressurization or over-speeding of equipment, and the technician will be required to inspect instrumentation in the plant, respond to defect reports and diagnose and take corrective action where required, and to write a shift report.

14. An Instrument Technician if intoxicated would not be able to undertake his duties without a high risk of there being a serious error of adjustment or calibration the consequences of which could result in serious damage to equipment and/or injury to personnel.”

I accept this evidence as true, and I find in light of that evidence that BSI was entitled to dismiss summarily Mr. Gongora for gross misconduct under the Labour Act especially in light of the evidence that he had been warned against this behaviour on prior occasions by Mr. Lyle Tillett. I also bear in mind the unchallenged evidence of Mr. Hough as to the

clear and present danger this type of reckless behaviour on the part of Mr. Gongora could cause to the lives of the staff at BSI.

8. *(iii) Is Mr. Gongora entitled to reinstatement or damages from BSI?*

Having found on the evidence that Mr. Gongora breached BSI's policy on drugs and alcohol and committed an act of gross misconduct under the Labour Act, I find that he is not entitled to any remedy against BSI.

9. Before I conclude, I just wish to make a few comments on the fact that much time was spent by the Claimant presenting evidence as to his past union activities and BSI's financial problems. Eminent witnesses such as Ms. Adele Ramos, Assistant Editor of the Amandala and Mr. Dylan Reneau, former leader of the Belize Workers Union were brought to give evidence on behalf of the Claimant. Counsel for the Claimant Mrs. Marin Young sought valiantly through her arguments to draw a nexus between Mr. Gongora's previous activities as leader of the Belize Workers Union and his termination from BSI. I must state at this point that I agree with the submissions of Mrs. Arzu Torres that it is clear from the language used in the preamble of the Collective Bargaining Agreement (as well as Article 3 and Article 10(B) that the Agreement **only** applies to hourly and task paid employees. Having accepted a promotion to permanent staff in the post of Electrical and Instrumentation Technician, Mr. Gongora knew he would no longer be governed by the Collective Bargaining Agreement, a fact demonstrated by the poignant letter dated November 15th, 2011 he wrote to Mr. Montalvo in which he stated that he would relinquish his position as union leader and of his own accord, accept the promotion offered to him by BSI.

"15th November, 2011

Dear Mr. Montalvo,

The last two hours has been extremely difficult for me and my belief but after doing some serious soul searching I hereby accept the promotion. I have put as priority in my life the livelihood and welfare of my wife along with my three daughters. I have chosen to relinquish my rights and privileges of being an hourly paid personnel/BH Protector and most importantly a Union Leader. Management is undoubtedly aware of my high

potential to strengthen the System Control Department and take it to higher levels. Now that I have joined the realm of the staff management, I hereby make a formal written request to have a few words with you.

Thank you for your consideration.

*Regards,
Julio Gongora.”*

Respectfully, this Court finds that there was no union-busting on the part of BSI, and that Mr. Gongora’s termination on March 6th, 2012 was as a result of his own reckless behaviour. This was not a case like that of Civil Appeal No. 10 of 2010 **Christine Perriott v. BTL** where there was clear evidence before the court that Mrs. Perriott’s union activities were the real reason behind her termination from BTL or **Mayan King Ltd. v. Reyes and Others** [2012] CCJ 3 the case of the banana workers attempts to unionize leading to their termination by the company. In those cases, there was evidence that the employers breached the Trade Union and Employer Organizations Act, Chapter 304 of the Laws of Belize by dismissing employees for union activities. As a Senior Employee of many years standing, Mr. Gongora wilfully jeopardized his job as an Electrical and Instrumentation Technician by showing up to work intoxicated, he had been warned on prior occasions by his supervisor not to do so, he breached BSI policy on drugs and alcohol, and BSI was therefore quite right to dismiss him summarily under the Labour Act.

10. The Claim is therefore dismissed. Costs awarded to the Defendant to be assessed or agreed.

Dated this Thursday, 17th day of December, 2015.

**Michelle Arana
Supreme Court Judge**