

ANTIGUA AND BARBUDA
IN THE INDUSTRIAL COURT

REFERENCE NO. 4 of 2000

BETWEEN

DAWN ROBERTS

Employee

and

GLOBAL TRAVEL AND TOURS

Employer

Before:

Mrs. Nelleen Rogers Murdoch

Chairman

Mr. Hubert Hood

Member

Miss Genevieve Benjamin

Member

Appearances:

Jackie James - Solicitor for Employee

E. Ann Henry - Solicitor for Employer

2000: November 29
December 6

JUDGMENT

Unfair Dismissal - Summary dismissal - claim for compensation - disciplinary letter to employee - employee not given opportunity to be heard - employee's written response - whether sufficient to amount to gross misconduct.

FACTS:

1. The Employee was employed by the Employer as a cashier in June, 1994.
2. On 10th February, 1995 some nine months after the employment commenced, the Employee was dismissed from the employment by the Managing Director of the Employer following an incident that had occurred in which the Employee failed to deal with a call which came into the office after her 4:15 p.m. closing time, and after which she was reprimanded by the Managing Director and wrote a letter in response to the Managing Director's reprimand.

CLAIM:

3. The Employee claims that she was unfairly dismissed and claims compensation for her unfair dismissal.

PRELIMINARY

4. The Employee filed a memorandum on 29th February, 2000 claiming unfair dismissal. In the memorandum the Employee included (in paragraphs 5 to 7 thereof) facts relating to the reference of the dispute to the Labour Department and facts relating to the outcome of those proceedings.
5. At the trial the Counsel for the Employer objected to any evidence being adduced relevant to the proceedings in the Labour Department and this Court ruled that the Employee was not permitted to put into evidence any matters arising out of the hearings which had been held at the Labour Department.

EMPLOYEE'S EVIDENCE

6. The Employee's evidence was that she was employed by the Employer (a travel agency) in June, 1994. That the Managing Director of the travel agency was one Rosemarie McMaster (who was to all intents her employer). That on 10th February, 1995 she was dismissed as a result of an incident which occurred on 2nd February, 1995, in which one Novella Sheppard who managed a travel agency branch of the Employer called in a record locator after 4:15p.m. and the Employee failed to take the information. The Employee admitted that she had refused to take

the record locator as it was past 4:15p.m. the end of her work day, and Novella was in fact calling in several and not one record locator.

7. On cross examination the Employee was asked about the importance of a record locator. She gave evidence that the record locator is an identification code usually made up of six characters (normally letters) which was used to identify the booking and travelling details of a passenger who was travelling, and from which tickets relating to the particular booking were to be printed. She stated on cross examination that she did not know what would have been the consequence of her failing to take the information re the record locator from Novella Sheppard as she did not directly deal with bookings.
8. In her evidence the Employee stated that the day after the incident, the Employer held a staff meeting in which the incident involving the Employee was discussed, and that at the end of the meeting the Employer presented the Employee with a memorandum dated 3rd February, 1995, in which the Employer discussed the issue that had occurred and advised the Employee that the behaviour which she exhibited during the incident was not conducive to unity or co-operation in the workplace.
9. The Employee also gave evidence that this memo was given to her without her having been given an opportunity to explain her side of the incident, and that she felt belittled, humiliated and embarrassed by the Employer's handling of the incident, although she gave no specific evidence of what was said or done in the meeting to create those feelings.
10. The Employee stated that because of her feelings about the Employer's handling of the matter, i.e her failure to allow her an opportunity to explain herself, and the memo which was handed to her, she wrote a letter dated 6th February, 1995 to the Employer to express her feelings.

EMPLOYER'S EVIDENCE

11. The Employer's evidence was given by the Managing Director of the Employer Mrs. Rosemarie McMaster. She gave evidence that she received a complaint from Novella Sheppard on the afternoon of February 2nd 1995, indicating that the Employee had refused to take a record locator which had been admittedly called in after 4:15p.m. The Employer stated that she herself took the information from

Novella and had the tickets relating to the record locators prepared and delivered to Novella as they were in respect of tickets for persons who wished to travel early the next morning.

12. She stated that she was greatly concerned by the Employee's failure to take the record locators because it was past 4:15p.m. since her failure would have resulted in passengers being unable to travel if the tickets were not issued.
13. The Employer stated that she had a meeting the next day with all members of staff and that the subject of the meeting was "staff unity and co-operation", and that she emphasized the necessity for staff to go the extra mile to get the job done, especially in view of the economic downturn which the company was experiencing due to competition and other factors.
14. She gave evidence that after the meeting, she asked if anyone had anything to say and that the Employee did attempt to explain what had transpired. She admits that despite the fact that the Employee was not given a full opportunity to state her side of the incident she gave the Employee the memo dated 3rd February, 1995. She also admitted that the memo had been written and prepared prior to her holding the meeting.
15. The Employer stated that she told the Employee that despite the fact that she would attempt to contact Novella Sheppard to clarify the matter she was still giving the Employee the memorandum so that the Employee could see her thoughts on the matter.
16. The Employer stated that on 6th February, 1995, the Employee reported to work but that she did not speak with the Employee that day. She further stated that the Employee approached her on the afternoon of Tuesday 7th February, 1995, and advised her at about 1:30 p.m. that she was going to lunch and handed her the letter dated 6th February, 1995, stating "This is yours". She also stated that 1:30 p.m. was not the usual lunch time for the Employee and that the office practice and policy was for staff to make a written request on established forms for a change in lunch hour to have the same approved by the Managing Director prior to the lunch hour being taken. This procedure the Employee failed to follow and had simply changed her lunch hour and informed the Managing Director of it only as she was leaving.

17. The Managing Director also gave evidence that when she read the contents of the Employee's letter of 6th February, 2000 she was shocked and stunned, as she had always previously had a good, even motherly relationship with the Employee.
18. She stated that on Wednesday 8th February, 1995 she approached the Employee and asked her how she could have written such a letter because she had been corrected. She stated that she told the Employee that she was convinced that the Employee had an attitude against correction and that the Employer had previously drawn to the Employee's attention that she was always resentful when corrected. She stated that the Employee stared at her during this interview in a very direct and disrespectful manner.
19. The Employer also stated that she drew the Employee's attention to the part of the Employer's letter in which she discussed her concern of unity and asked the Employee how she could work for a boss for whom she had no respect based on the contents of her letter. She stated that she requested the Employee to give her some guidelines as to how there could be unity in the office, and that the Employee advised her, that that was a matter for her (the Employer), which response so shocked her that she then ended the meeting. She said she had no other talk with the Employee, but the Employee's attitude was creating a problem as she was uncommunicative except for saying good morning or good afternoon and that there was a tense atmosphere in the office as a result.
20. The Employer stated that she thereafter further considered the matter, consulted with her Board and a decision was taken to terminate the Employee to maintain a smooth working relationship in the office.

ISSUES:

21. At the end of the evidence for both sides Counsel for both the Employer and the Employee agreed with the Court on the main issue for decision and agreed to prepare written submissions addressing the main issues. The issues agreed upon were:
 - (1) Was the Employee's letter of 6th February, 1995 capable of amounting to gross misconduct as to justify a summary dismissal.

- (2) Was the Employer's response to the letter of February 6th a reasonable response.
- (3) What is the impact of the memo of 3rd February, 1995 from the Employer to the Employee on the issues.

EMPLOYEE'S SUBMISSIONS

- 22. Counsel for the Employee submitted that the Employer's memo of 3rd February, 1995 to the Employee was in effect a disciplinary measure in as much as the Employee's attitude was to be observed for two months after which the continuation of her employment would be reviewed. That the letter was a disciplinary action taken in breach of the rules of natural justice as the Employee was condemned without first being heard.
- 23. The Employer handled the entire situation badly and had allowed her sensibilities to be wounded by the Employee's frank comments.
- 24. Counsel submitted that while some of the Employee's comments were ill advised, the letter taken as a whole does not rise to the level of gross misconduct which would entitle the Employer to dismiss summarily. The appropriate action would have been a warning if indeed the letter was misconduct at all. She further submitted that it cannot be argued in this modern day of labour relations that an Employee was precluded from freely expressing herself on matters relating to her Employer's conduct, so long as there was no pejorative content in the speech.
- 25. The Employer's reaction was unreasonable, as the natural effect of the Employee's letter was not such as would threaten the continuation of the employment. The letter's tone must be set against the backdrop of the Employer's memo and the unfair treatment meted out to the Employee.
- 26. The following cases were cited in support of these submissions:
Rouse v Mendoza (1967) 12W1R1; William Russell v Quality Builders Limited Reference No. 15 of 1995; Mark Blanchard v. National Parks Authority Reference No. 9 of 1994; Antigua Commercial Bank v Mary White (Civil Appeal No. 1 of 1981).

EMPLOYER'S SUBMISSIONS

27. The Employee's letter coupled with her behaviour of 7th February, 1995 and her response to the Employer's overtures on 8th February, 1995 amounts to gross misconduct without the meaning of section C58 (1) (a) and C59 (1) (a) of the Labour Code.
28. That in considering what amounts to gross misconduct the facts of each case must be given due consideration. The case of Charles Merchant v Liat (1974) Limited Reference No. 16 of 1989 in which an employee was held to have been fairly dismissed after having verbally abused his manager was submitted for the Court's guidance on this point.
29. Counsel submitted that the court in that case held that the Employee had demonstrated that the employment relationship could not reasonably be expected to continue and submitted that this court apply the test in Merchant's case in the present matter in deciding whether the Employee's conduct was gross misconduct.
30. The Court was also referred to the cases of Danzler Dublin v The Royal Bank of Canada Reference No. 15 of 1983; Angella Roberts v St. James' Club Reference No. 14 of 1993; and Colin Plummer v Harmony Hall (Antigua) Ltd. Reference No. 13 of 1990.

LAW:

31. The law on this matter is to be found in the Antigua Labour Code. **Section C58** of the Labour Code provides the test for a good cause for dismissal. The section provides as follows:

"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 C59(1) and (2);

(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."*

32. **Section C59** of the Code provides as follows:

"C59 (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in 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."

DISCUSSION

33. A resolution of the issues raised requires a close examination of the circumstances leading to the dismissal and of necessity a close scrutiny of the Employer's memo of 3rd February, 1995 as well as the Employee's letter of 6th February, 1995.

The Employer's Memo

34. This memo was admittedly written by the Employer before she had an opportunity to hear the Employee's side of the incident of 2nd February, 1995 and admittedly given to the Employee before she had a full opportunity to state her side of the matter.

35. A close scrutiny of the memo shows that the Employer, despite the fact that she delivered the memo to the Employee without hearing her side, did not in the memo, embarrass, humiliate, insult or belittle the Employee. The memorandum deals with the issue of unity in the office and of the necessity for all parties to work for the continued success and development of the company.
36. The memo speaks of every employee's responsibility to go the extra mile to assist sales and to show one hundred percent interest in the company's business. It outlined the incident and draws to the Employee's attention that angry, impatient or hostile employees on the job are not appreciated, neither are employees who do not go the extra mile, but rather that efficient and humble employees are appreciated. The memo urges the Employee to focus on her better qualities and to improve them.
37. It contains no statements or comments which show an intention to humiliate or belittle, or which can objectively be said to be calculated to have that result.
38. The memo also contains a statement indicating that the Employee's service and attitude will be evaluated over the next two months to ensure that the required level of interest and professionalism is portrayed at work.

The Employee's letter

39. The Employee's letter was written some time between the end of the working day of Friday 3rd February, 1995 and Tuesday 7th February, 1995 when it was delivered to the Employer. The letter is dated 6th February, 1995.
40. A close examination of the letter shows that the Employee was very aggrieved by the fact that the Employer had accepted Novella Sheppard's side of the incident and that the Employee had not been given an opportunity to explain herself.
41. The Employee in her letter discloses that she felt humiliated, belittled, and embarrassed by the Employer's meeting on 3rd February, 1995 when the incident was discussed in the presence of all staff members, although the letter discloses no specific words or actions on the part of the Employer that would have created

these feelings. It is clear that the Employee's feelings of humiliation etc. were aggravated by the fact that she received what she felt was a disciplinary letter after the meeting. The tone of this letter is therefore quite angry.

42. In addition to her statements that she felt unjustly treated by the Employer, the Employee in her letter-

- *accuses the Employer of generally dealing unfairly with her staff; and infers that the staff are not appreciative of the Employer's treatment of them;
- *states that the Employer sets a poor example to staff and in proof thereof cites an incident relating to a named client from whom she alleges the Employer hid; also suggests that the Employer herself does not go the extra mile although she talks of it.
- *suggests the Employer's handling of this incident is not isolated, as the Employer is habitually biased and is either unwilling or unable to make fair decisions;
- *states that the Employer's statements about loving her staff are just lip service and that she has no true concept of love;
- *suggests that the Employer needs to examine herself to discover what changes should immediately be made.

43. The Employee's letter also stated that she concluded from what had transpired, that the incident-

- *spoke volumes for the Employer's judgement and personality or lack thereof;
- *shows that the Employer had no morality in the work place;
- *shows that the Employer's talk of standards was just talk and no more, a clear inference that the Employer had no standards.

CONCLUSION

44. Having regard to the principles of the Labour Code and to the authorities to which we were referred the Court has concluded:

- (A) The giving of the memo to the Employee prior to hearing her side would appear to be contrary to the principles of natural justice and could understandably have created in the Employee feelings of having been unfairly treated.
- (B) The fact that the memo contains a statement indicating that the Employee's service and attitude were to be evaluated over the next two months, would understandably have created in the Employee the feeling that she was being disciplined under the Labour Code without having been heard on the matter.
- (C) Notwithstanding the statement on the two month evaluation, the Employer's memo does not in law constitute a disciplinary letter under the Labour Code as it does not warn of future disciplinary action, neither does it impose any disciplinary sanctions. The tone and thrust of the memo is one of correction and admonition. It is therefore one which any reasonable Employer could have written in similar circumstances.
- (D) The Employee in her evidence admitted that she had refused to take the record locator from Novella Sheppard, as it was after 4:15 p.m. so that despite the fact that the memo was prepared and delivered in circumstances which may have been contrary to natural justice, the Employee by her own evidence shows that the memo would have been justified by the Employer after the Employee had in fact given her side of the incident.
- (E) While the giving of the Employer's memo in the circumstances in which it was given, is not the most desirable situation in view of natural justice considerations, the Employee's response cannot be described as merely her frank expression of her injured feelings and her sense of being unfairly treated. The Employee's letter goes beyond what would have been a reasonable although angry response.
- (F) The Court finds the letter to be insulting, disrespectful and discourteous, and the Employee makes in the letter disparaging remarks and slurs against the Employer's character which are not limited to the incident. The court therefore disagrees with Counsel for the Employee that there was no pejorative content in the letter.
- (G) The impact of the Employee's letter in its totality, in the Court's view is that it is capable of amounting to serious misconduct under section C59 (1) (a) of the Labour Code. The Employee clearly demonstrated by her conduct that the employment relationship could not reasonably be expected to continue. Apart from the other statements in the letter the Employee wrote that the Employer in acting as she had done had "removed any possible foundation for unity" in the office. She

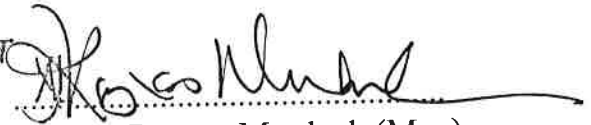
reiterated this position on cross examination when she stated that the Employer by her action had made it impossible for there to be unity in the work place.

- (H) The Employee's conduct after the delivery of the letter also confirms that the trust and confidence that should repose between Employer and Employee had been totally eroded by the Employee's conduct in that she showed no feelings of remorse and in fact acted towards the Employer after the delivery of the letter in a manner which demonstrated her lack of respect for the Employer.

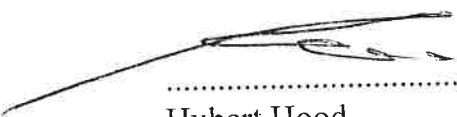
DECISION

45. In the circumstances the Employer acted reasonably and was justified in dismissing the Employee. The dismissal is not unfair and no compensation will be awarded to the Employee.

Dated this 12th day of March
2001.


Nelleen Rogers-Murdoch (Mrs.)
Chairman

I concur


Hubert Hood
Member

I concur


Genevieve Benjamin (Miss)
Member