

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 OF 2000

BETWEEN:

DAVID TITUS

Employee

and

SANDALS (ANTIGUA) LIMITED

Employers

Before:

The Hon. Cyril L. Maundy
The Hon. Edward T. Henry
The Hon. Genevieve Benjamin

President
Member
Member

Appearances:

Justin L. Simon, Barrister-at-Law, for the Employee
R.W. Hill, Barrister-at-Law, for the Employers

2001: November 26 & 27
2002: January 2, 3 & 4

JUDGMENT

Unfair Dismissal – hotel employee alleged to have attempted to kiss guest while they were alone and against her will – employee contends that guest was mistaken and he did not take out anyone on the day of the alleged incident – employee suspended pending investigations and later dismissed – guest did not appear to give evidence or be cross-examined but submitted a handwritten report of the alleged incident – report not notarised, witnessed by

anyone or given under oath – Suit in New York for Sexual Harassment against the Employers dismissed.

Historical Background

- [1] **Maundy, P.:** By a Reference dated February 1, 2000, the Honourable Minister of Labour notified the Court of a Trade Dispute between the Employee and the Employers.
- [2] In his Memorandum dated May 19, 2000, and filed on May 20, 2000, the Employee alleged that he was unfairly dismissed by the Employers and is entitled to compensation for Unfair Dismissal.
- [3] In their Memorandum dated and filed on the 26th day of September, 2000, the Employers state that the dismissal was fair and the Employee is not entitled to any compensation.
- [4] The Employers own and operate an all inclusive hotel for couples at Dickenson Bay, St John's, Antigua, and attached to the hotel is a Watersports Department offering snorkelling, scuba diving, windsurfing, kayaking, tours/rides on the sunsail/sunfish, the hobicats, water cycles and water skiing.
- [5] The watersports facilities are available to resident guests as well as day guests, i.e. persons who purchase tickets to spend a day at the hotel.
- [6] On Wednesday, August 28, 1996, one Lisa Girden and her boyfriend, David, who were guests at another hotel, Carlisle Bay Hotel near Old Road, in the Parish of St Mary, Antigua, about 12 miles away were day guests at the hotel and whilst David went snorkelling, Lisa decided to go windsurfing and went to

the section of the Watersports Department where the various equipment were handed out by the Attendants; the Attendants would instruct the guest as to how to operate the equipment or, where appropriate, take the guest out to sea in the equipment.

- [7] The department had a complement of approximately 16 Attendants and when not out at sea, they would be present at "the Base", a place on the beach where the equipment are kept and had to be obtained when required.
- [8] The Attendants' hours of work were 8:30am to 12:00pm and 1:00pm to 5:00pm.
- [9] At approximately 2:15pm on August 28, 1996, Lisa Girden went to the Base and requested to go windsurfing but was told that the water was too rough for this. As an alternative she decided to go for a ride on the sunfish, accompanied by one of the Attendants. The Attendants wore uniforms, dark blue shorts and light blue shirts with the word Sandals at the back and the individual's name at the front.
- [10] In her report Lisa Girden said that she went for a ride on the sunfish with an Attendant, the Employee, that they went far out from shore and, while out there, he sexually harassed her, viz, he touched her on her thigh, kissed her and tried to put his tongue in her mouth.
- [11] On her return to shore Lisa Girden made a complaint to Ruth Horsford and was asked to file a report. Miss Girden left Antigua the following day but submitted a handwritten report in which she related the allegations – See Exhibit DT1.

- [12] In her report Miss Girden said that the Attendant in question was one "David" alias Dingyman, which is the first name and alias respectively of the Employee.
- [13] The report was received on the day after the alleged incident and on that morning the Employee was summoned to the office where he was told of the allegations and suspended for a week for Management to carry out an investigation.
- [14] The Employers appointed one George Carr, Chief of Security, to investigate the matter but Lisa Girden had returned home and was not available for questioning by Mr Carr or any other person including the Employee; she did not attend Court to give evidence.
- [15] George Carr obtained written statements from two of the Watersports Attendants, Hannibal Fleming and Lenroy Caleb who said that between 2:00pm and 2:15pm on the day in question a female guest made a request to go for windsurfing lessons but was informed that it was too windy and too rough to go surfing and shortly afterwards they saw the Employee sailing up and down, in the bay area with a white lady in a sunfish (boat).
- [16] George Carr no longer works with the company and was not available to give evidence. Hannibal Fleming did not give evidence either, but in his evidence, Lenroy Caleb was most emphatic that on the afternoon in question he saw the Employee sailing up and down the bay area in a sunfish with a white lady; however, he was unable to give any description of her, e.g. whether she was wearing a swimsuit or regular attire, whether the white lady he said he saw was Lisa Girden or would recognise her if he saw her again. Hannibal Fleming did not appear to give evidence.

- [17] The Employee denied that on the day in question he sexually harassed the guest and stated that he never took anyone sailing that afternoon. Also, that on that entire afternoon he was at the Base giving out equipment and never left there.
- [18] The Employee's evidence was corroborated by that of Walter Potter, another Watersports Attendant and Michael Mullin who, at the time was a Watersports Attendant at Sandals but now works at another hotel, Jumby Bay. In his evidence Mr Potter stated categorically that at no time did the Employee leave the Base that afternoon nor did he see a sunfish out at sea. Michael Mullin's evidence was similar to that of Walter Potter and he said that after lunch on the afternoon in question he saw the Employee sitting under an umbrella at the Base, he did not see him on a sunfish, he did not see any sunfish from Sandals out at sea and that he himself did not go out on any boat that day.

Triable Issues

- [19] The main issues for determination appear to be:
- (a) Whether the dismissal was fair?
 - (b) Did the Employee take a lady out to sea on the afternoon of August 28, 1996, and, if so, was that lady Lisa Girden and did he sexually harass her as alleged?
 - (c) Did the Employee remain at Base on the afternoon in question and did not go out to sea?
 - (d) Was the Employee guilty of misconduct within Sections 58 and 59 of the Antigua and Barbuda Labour Code (Cap. 27, Laws of Antigua and

Barbuda, Revised Edition, 1992) hereinafter referred to as "the Labour Code"?

- (e) Was the investigation carried out by the Employers sufficiently thorough?
- (f) Was the decision to dismiss reasonable in the circumstances?

The Arguments

[20] In his submission Mr Hill asked the Court to find that the dismissal was fair and that the Employee was not entitled to any compensation. Alternately, said Mr Hill, if, which is denied, the Court finds that the dismissal was unfair, that he did not commit the misconduct complained of and that the Employers erred in ordering his dismissal, because of his breach of trust and falsely insisting that he did not sail the sunfish on the afternoon in question, he should not benefit from his false statement but should be given a nil award.

[21] Mr Hill contended that:

- (a) The Employee was seen talking to the guest on the beach on the afternoon in question and shortly afterwards he was seen by Hannibal Fleming riding up and down the bay with a lady on the sunfish. This view was confirmed by Lenroy Caleb. Also, said Counsel, the evidence of Walter Potter and Michael Mullin should not be believed.
- (b) The Court has to weigh all the evidence and decide the issue on the balance of probabilities.
- (c) The Employee was not able to confront the guest re the allegations because she had to leave and left the country the following day.
- (d) The hotel was very concerned about its reputation and the possibility of a Law Suit in the United States, which occurred although it was dismissed and the hotel was exonerated.

- (e) As an Industrial Jury the decision of the Court has to be reasonable and not perverse.
- (f) The Employee lied to the company and it was a very serious matter as the hotel is one of a chain that caters for hundreds of guests and had to nip conduct such as that alleged in the bud because of the grave damage that could otherwise be done.
- (g) The test to be applied in determining whether the dismissal was fair is that of reasonableness as laid down in Section 58 (2) of the Labour Code and the objective and not the subjective test should be applied.
- (h) The Employee contributed to the dismissal and showed a lack of trust as well as dishonesty and in the final analysis the issue is whether the Employers acted reasonably and did what any reasonable Employer would have done given those set of circumstances.

[22] In support of his submission Mr Hill relied on the following authorities:

- (i) Polkey V A.E. Dayton Services Limited (1987) ALLER974 (H.L.).
- (ii) Haddon V Van Den Bergh Foods Limited (1999) ICR1150.
- (iii) Foley V Post Office (2000) ICR1285.
- (iv) Harvey on Industrial Relations and Employment Law, Issue 128, paragraphs 1480 – 1518.

[23] Mr Simon did not share Mr Hill's views and asked the Court to find that the dismissal was unfair. Mr Simon conceded that if the Court found that the Employee had sexually assaulted or harassed the guest, as alleged, the dismissal would be fair as their business is service orientated and they have similar businesses in several parts of the world and the Caribbean. However, Counsel submitted that the dismissal was unfair and contended that:

- (i) The allegation made by Lisa Girden is not corroborated.

- (ii) It is a serious allegation against an Employee who in his 4 years of service had never had a complaint made against him and thus there is a duty on an employer in those circumstances to act reasonably when deciding whether to dismiss.
- (iii) The Court has to apply Section C.58 (2) of the Labour Code in determining whether the Employers' acts were reasonable in the circumstances.
- (iv) The Court has not had the benefit of Lisa Girden's Cross-examination – a report was made to Ruth Horsford but Ruth Horsford did not come to give evidence; further there has not been any report from her.
- (v) The Suit brought by Lisa Girden against the Employers in New York for the alleged Assault and Sexual Harassment was dismissed by a jury of her peers.
- (vi) The investigation carried out by the Employers was not sufficiently thorough: they did not question Michael Mullin, Walter Potter or George Carr (who did not give evidence) and relied on statements taken by George Carr from Lenroy Caleb and Hannibal Fleming and Lisa Girden's purported report.
- (vii) In her report Lisa Girden said she asked the Employee to go windsurfing but in his statement Hannibal Fleming said it was he that she asked and not the Employee.
- (viii) There has not been any evidence whether the name "Dingyman" was obtained by Lisa Girden from speaking with Ruth Horsford, or was known to her before then.
- (ix) There are too many defects, inadequacies and inconsistencies to find that the Employee did commit the acts complained of.
- (x) Lisa Girden, from her report, did not sail round the bay, as Walter Potter said, but out at sea, in the deep.

- (xi) The Court is presented with two conflicting stories – he who proves must assert but he who is accused remains innocent until proven guilty.
- (xii) The burden remains on the Employers on the balance of probabilities.
- (xiii) With regard to the Polkeys case, the Court should bear in mind that Section 57 (3) of the Employment Protection Consolidated Act, 1978 (U.K.) was amended by Section 6 of the Employment Act, 1980, to provide for a neutral burden of proof but our Law is based on reasonableness.

[24] In support of his contentions Mr Simon referred the Court to:

- (1) Page 107 of Unfair Dismissal by Andermans, Second Edition, published by Butterworths, London, 1985.
- (2) Unfair Dismissal Cases by John E. Mc Glyne, published by Butterworths, London, 1979.
- (3) Halsbury's Laws of England, Fourth Edition, Volume 16, published by Butterworths, London, 1976.

The Law

- [25] Under the Labour Code an employee who has served his probationary period (the first 3 months of employment) has a right not to be dismissed without just cause, i.e. unfairly dismissed.
- [26] The Act permits an employer to dismiss an employee with impunity in certain circumstances provided there is a factual basis for the assigned reason – See Sections C.57 and C.58.

- [27] The Act lays down the test to be applied in determining whether a dismissal is unfair – See Section C.58 (2).
- [28] By Section 9 of the Industrial Court Act, 1976, Cap. 274, Laws of Antigua and Barbuda, Revised Edition, 1992, the Court is not irrevocably bound by the rules of evidence and has a discretion to depart therefrom.

The Decision

- [29] Throughout his testimony the Employee repeatedly denied that he was guilty of the allegations made against him. He contended that on the afternoon in question he did not leave the shore at all but spent the time at the Base handing out equipment to guests and speaking to various persons. The Employee was adamant that he did not take out any white female on a sunfish or had sexually harassed or tried to sexually harass any female as alleged.
- [30] The two witnesses called by the Employee corroborated his evidence and testified that he did not go out to sea on a sunfish on the afternoon in question or take out a lady on a sunfish on the said afternoon.
- [31] Juxtapositioned to the evidence of the Employee and his witnesses is the written statement of Lenroy Caleb and Hannibal Fleming that on the afternoon in question they saw the Employee sailing on a sunfish up and down the bay with a white lady on board although they could not say whether the lady was Lisa Girden. But it must be noted that their written statements were not taken on oath and although he was very firm that the contents of his statement were true only Lenroy Caleb of the two gave evidence in Court and was available for Cross-examination.

[32] With regard to the Employers' case, the Court is faced with a number of difficulties:

- (a) The Employers relied exclusively on an un-notarised report alleged to have been written by one Lisa Girden who did not appear to give evidence and make herself available for Cross-examination. We are told that Lisa Girden first made a report to Ruth Horsford but Ruth Horsford never attended Court to give evidence and this statement is therefore Hearsay – the Court is being asked to pronounce upon a report that was not made on oath, that was not witnessed and the maker of which has not been identified or proved.
- (b) If, as was alleged, the Employee was seen in a sunfish with a white lady sailing up and down the bay on the afternoon in question, there has not been any evidence that Lisa Girden was white or that the lady in question was Lisa Girden.
- (c) In the investigation the Employee did not have an opportunity to confront Lisa Girden in person or at all and challenge her allegations; or those of Lenroy Caleb or Hannibal Fleming – Hannibal Fleming did not give evidence and so the Employee did not have an opportunity to Cross-examine him and challenge his statement.

[33] Dismissal is a very serious matter with many possible adverse results and an allegation of sexual harassment of hotel guests by employees is very serious indeed and is something which this Court will not hesitate to condemn. Tourism is vital to the economy of this country and large sums are invested by Government and the private sector to attract visitors to these shores and sexual harassment of hotel guests can be damaging to the reputation of the hotel as well as to the tourism efforts – the Court was told that the lady in

question brought a Suit in New York against the hotel for the alleged behaviour of the Employee, however, this was dismissed.

- [34] Mrs Carlos, the Executive Administrative Assistant of the Employers, said that after considering the allegations in the reports and the statements of Lenroy Caleb and Hannibal Fleming, Management took the view that the Employee lied when he said that he did not take anyone out to sea on a sunfish that afternoon and based on this they concluded that the allegations of sexual harassment in the letter were correct.
- [35] In allegations of misconduct and issues of investigation, it is of paramount importance that any investigation carried out should be thorough and complete although failure to do so does not necessarily render a dismissal unfair, per se.
- [36] It is interesting to note that counsel for the Employers did not raise the issue of Hearsay or the non-admissibility of Lisa Girden's Report or that of Hannibal Flemming and seemed to have conceded that they were admissible within the context of Section 9 (1) of the Industrial Court Act, 214, Laws of Antigua and Barbuda, Revised Edition, 1992. The subsection permits the Court in the hearing and determination of any matter before it to act without regard to technicalities and legal forms and provides that it shall not be bound to follow the rules of evidence stipulated in the Evidence Act. In the circumstances I will not make a ruling on the issue.
- [37] The Employers were grossly disadvantaged in that the accuser, Lisa Girden, did not confront the Employee and especially, did not attend Court to give evidence, be Cross-examined and afford the Court the opportunity to note her demeanours and endeavour to determine whether her allegations should be

accepted. Added to this, of course, is the issue of the authenticity of the Report – no one witnessed the writing of the Report and it is not notarised; of course it could be genuine but at the same time could it not have been written by someone other than Lisa Girden – there was no testimony that even the style of writing was her own. The parties treated the Report as genuine but where is the proof of her existence or authorship of it?

[38] It is noteworthy that there was no evidence to corroborate Lisa Girden's allegation she was sexually harassed by the Employee and even Lenroy Caleb who testified he saw the Employee sail up and down the bay area with a white lady on the day in question, he did not know whether the lady in question was Lisa Girden. Hannibal Flemming, who corroborated the evidence of Lenroy Caleb, did not attend to give evidence and he too does not say in his written statement that the lady in question was indeed Lisa Girden.

[39] In instances such as the present the Court has to ask itself which of the parties should be believed and in doing so it is incumbent upon it to look at all the surrounding circumstances and to see whether the actions of the Employers in terminating the Employee's employment were reasonable within Section 58 (2) of the Labour Code – Polkey's Case was based on the English Legislation, viz, Section 57 (3) of the Employment Protection (Consolidation) Act, 1976, as amended.

[40] The Employers considered two different issues, viz, the allegations of sexual harassment on one hand (for which there was no testimony) and whether the Employee gave false evidence when he said he did not take anyone out to sea on a sunfish on the afternoon in question. Veronica Carlos testified that Management concluded that the Employee had lied about his movements on

the afternoon in question and, based on this, formed the view that he also lied with regard to the sexual harassment allegation and this was the basis of their decision to dismiss.

[41] The Employers did carry out an investigation but it was not sufficiently thorough; the Employee was not able to confront his accuser or all those who gave evidence against him (Lenroy Caleb or Hannibal Flemming), no steps were taken to ascertain whether Lisa Girden was the lady alleged to have been seen on the sunfish with the Employee on the day in question.

[42] In arriving at a decision I carefully considered the reports and the evidence presented by the parties, the cases and works of authority cited, the relevant provisions of the Labour Code and the Industrial Court Act, and the contentions of counsel, and have not found that the Employers had acted reasonably in the circumstances and to my mind the dismissal was not fair.

The Award

[43] A person the victim of an Unfair Dismissal is entitled to compensation as per the established heads and in this instance the compensation is as follows:

- (a) **Basic Award**: Under this head the Employee is entitled to one day's pay for each month of service. The Employee commenced employment with the Employers in August, 1992, and was dismissed on August 28, 1996, after approximately four years (48 months) and his basic wage at the time was \$ 61.80 per day or \$ 309.00 for a five day work week thus his entitlement is, therefore, $\$ 61.80 \times 48 = \$ 2,966.40$.
- (b) **Immediate Loss**: The Employee was out of employment from September, 1996, to March, 1997, i.e. 7 months or approximately 28

weeks so his entitlement under this head is \$ 459.00 x 28 = \$ 12,852.00.

- (c) **Manner of Dismissal:** I am of the view that the dismissal would make it more difficult for the Employee to find employment and a prime candidate for dismissal and would, therefore, make an award of \$ 3,000.00.
- (d) **Future Loss:** No award.
- (e) Payment for the week the Employee was on suspension - \$ 459.00

[44] The sum total of compensation is thus \$ 19,277.14 but it must be observed that a dismissed employee is under a duty to take such steps as are reasonable to mitigate his loss by finding new or alternate employment or self-employment where appropriate. The Employee is a carpenter and although he tried to find new employment, this seems to have been in the Watersports field only and in my view, even if this failed he could have sought reasonable alternate employment, e.g. as a carpenter, and obtain same in approximately 3 months and, in the circumstances, the award for Immediate Loss will be reduced by \$ 50% and is, therefore, \$ 6,426.00.

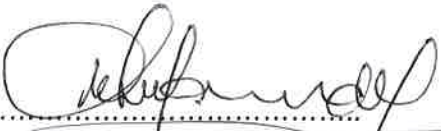
Mr Hill conceded that the Employee was paid but half of his entitlement under the Thrift Fund and I, therefore, order payment of the remaining portion of \$ 2,233.50.

Conclusion

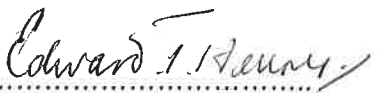
[45] I find that the dismissal was unfair and the sum total of the award is \$ 15,084.90.

[46] It is hereby ordered that the Employers shall pay to the Employee the sum of \$ 15,084.90 payment to be made by the 4th day of March, 2002. There shall be no order as to Costs.

DATED the 4th day of February, 2002


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Cyril L. Maundy
President

I concur


.....
Edward T. Henry
Member

I concur


.....
Genevieve Benjamin
Member