

**THE INDUSTRIAL COURT**

**REFERENCE NO. 81 OF 2000**

**BETWEEN**

**MARY WILLIAMS**

**Employee**

**and**

**ANTIGUA PLUMBING AND HARDWARE Employer**

**Before:**

Mrs. Nelleen Rogers Murdoch – Chairman

Mr. Hubert Hood - Member

Miss Genevieve Benjamin – Member

**Appearances:**

Samantha Marshall, Marshall & Co. for the Employee

Sherfield Bowen for the Employer

2003: October 27

[2006: June 27]

**JUDGMENT**

Unfair dismissal – no prior disciplinary matters arising – employee converted Seventh Day Adventist- requests permission not to be scheduled for work on Saturday Sabbath – permission refused – Employee fails to report for work on consecutive Saturdays – employment terminated on Monday following Saturday without notice.

**FACTS**

1. The Employee was employed by the Antigua Plumbing and Hardware Centre since April, 1983. Her employment was terminated on 13<sup>th</sup> December, 1999 when she reported for work. She subsequently filed a reference claiming that she had been unfairly dismissed. At the time of her termination she worked for \$565.00 per week.

## **CLAIMS**

2. The Employee claims in her memorandum that she had been unfairly dismissed and that she had in fact been discriminated against because she was a practicing Adventist.

The Employer denies that the Employee was unfairly dismissed or that her religion was the reason for her dismissal.

## **Employee's evidence**

3. The Employee worked at Antigua Plumbing and Hardware since April, 1983 she worked in the storeroom. The hours of work were Monday to Friday from 8:00 a.m. – 4:00 p.m. (with an hour break from 12 – 1 for lunch) and Saturdays from 8:00 a.m. – 12:00 noon. She reported to the manager Mr. George Ryan who was her supervisor.
4. Sometime prior to her termination on 13<sup>th</sup> December, on or around the 10<sup>th</sup> December, 1999, the Employee held discussions with Mr. Ryan concerning her employment. The discussions concerned her working schedule and her request for time off. She requested time off to go to church on Saturdays. Her request was written and undated but was delivered some time in late November, 1999. (Exhibit MW1)
5. She requested Saturdays off and a reduction in her pay for the time off so she could attend Saturday church. She alternatively proposed to work through her lunch hour on Mondays to Fridays to make up for the time if that was possible. The Employer had no discussion with her on the subject of her request. His reply was by letter dated 9<sup>th</sup> December, 1999. Exhibit MW2 denying her request. The Employee responded to the Employer's letter of 9<sup>th</sup> December, 1999 by a handwritten letter (Exhibit MW3).
6. Between the date of the handwritten letter (9<sup>th</sup> December, 1999) and the date of her termination there was no discussion between the Employee and the Employer on the matter. She reported for work on the Friday 10<sup>th</sup> December, 1999 but did not report to work on Saturday 11<sup>th</sup> December, 1999.

7. When she reported to work on Monday 13<sup>th</sup> December she went to the storeroom but her card to punch in was not in place. She was then called to the office over the intercom and asked to report to the office. She reported to Mr. Ryan immediately and was told not to return to the storeroom because she no longer worked there. She requested a letter of termination and was told that there was no letter because she had fired herself. She therefore left the premises.
8. On cross examination the Employee gave evidence that she had not reported for work on Saturday 11<sup>th</sup> December, 1999. Neither had she reported for work on Saturday 4<sup>th</sup> December, 1999, although she had not asked for time off. Prior to that she had not reported for work on Saturday 27<sup>th</sup> November, 1999 as she had been baptized into the Adventist faith on 27<sup>th</sup> November, 1999. She did not have permission from her employment to have time off on that Saturday either.
9. Some time prior to her termination her pastor at her request had written a letter to Mr. Ryan requesting that she be given Saturdays off. She was advised by her Pastor just around the date that she was terminated that Mr. Ryan had replied to the pastor's letter. On Monday 13<sup>th</sup> December, 1999 when she was terminated she stayed in Mr. Ryan's office between 3 – 5 minutes or it might have been 8:02 when she left. At no time during that conversation did Mr. Ryan refer to her absence during the previous Saturdays.
10. Prior to being baptized on 27<sup>th</sup> November, 1999 she visited Mr. Ryan with her pastor. There had also been a discussion between herself Mr. Ryan and Miss Bramble another employee who was in a management position and works with the employer. These discussions were general discussions and did not relate to her employment. These discussions also took place prior to her letter concerning her conversion to the Adventist faith.

#### **Employer's evidence**

- George Ryan the founder and managing director of the Employer Co. gave evidence.
11. The employee worked with the Employer from 10<sup>th</sup> April, 1983. There came a time when he became aware that the employee was not showing up for work on Saturdays. This was some time in November, 1999. He called her in and she explained that she was converted and was now an Adventist. These discussions took place prior to the date he received a letter from her pastor in November. The first letter from her pastor was undated. He called the employee and

asked her if she realized that she could not continue and her reply was that she was now Adventist and could not work on Saturdays. He then asked her if she realized that Saturday was one of his busiest days and that it was not acceptable for the storeroom work not to be supervised by the supervisor on one of the store's busiest days. The employee responded that she was an Adventist now and that she could not and would not work on a Saturday. He advised her that she would have to resign since her contract required her to work on Saturdays. The discussion ended there. She was advised to continue working and the next Saturday she did not return to work.

12. He then got a letter from the pastor of the employee's church asking that she be given Saturdays off as she was a converted Adventist. He replied denying that request and stating what he thought should be done. In spite of this the employee continued to stay away from work on Saturdays.
13. He cannot recall the exact date but he remembers one Monday morning that he removed the employee's punch card from its usual place in the machine and told the storeroom boys or the porter to tell the employee to report to him when she came to work. The employee reported to him when she arrived and he asked her about her absence the previous Saturday and advised her that if she was not prepared to work on Saturdays the best thing for her to do was to resign. The Employee walked out and that was the last he saw of her.
14. Prior to these events the Employee had reported to work every Saturday. After he became aware of the Employee's absence on Saturdays she made no promise to come in on Saturdays. Because of the decision stated in her letter it meant that she would never ever return to work on Saturdays. After her letter to him and his response she had never afterward turned up to work on a Saturday. He can narrow it down to about 5 consecutive Saturdays that the Employee did not show up for work. He took her punch card on the Monday morning after the 5<sup>th</sup> consecutive Saturday that she failed to show up for work.
15. On 13<sup>th</sup> December, 1999 the discussion centered around the letter from her pastor and his reply to the letter. They discussed that the Employer had an obligation to its customers and that the Employer could not allow an employee to unilaterally decide to stay away from work or to set their own working hours. If the Employee could not honour her contract with the Employer then she would have to resign. The conversation ended there and the Employee walked away.

He never told the Employee during the meeting to remove herself from the premises and further denied telling her that she did not work there.

16. Prior to Ms. Williams' requesting Saturdays off other persons made similar requests but they eventually left even after their pastor had come and made representations on their behalf. The only thing he told her in the meeting on 13<sup>th</sup> December, 1999 was that there was one thing to do if she was not prepared to work on Saturdays and that was to resign. After that she left. He did not terminate her employment and he is asking the court to take into consideration that Ms. Williams abandoned her position. He is unaware that employees on being terminated have a right to a letter of termination. There was no reason to give a letter of termination as the Employee had already abandoned the job.
17. Before this period and in the six months prior to the termination of the employment he had no particulars that he wished to bring to the court's attention concerning the Employee. The relationship between management and the Employee was and is very cordial. The Employee is a very respectful employee.
18. On cross examination the witness gave evidence that the Employer keeps records and has a punch card machine which tells the story. Employees punch in and are paid based on a record on the punch card. It is not possible therefore that he is mistaken about the dates or the number of times the Employee absented herself on a Saturday and he denied that the first Saturday she was absent was November, 27<sup>th</sup> 1999.
19. He summoned her by the office intercom system on the morning of 13<sup>th</sup> December, 1999. It was necessary for him to remove her punch card that morning to have her come to his office. He denied advising her when she came to his office that her services were terminated and admitted that he was of the view at the time that the Employee should resign if she could not work on Saturdays. These views he had already communicated in his letter to her pastor. Her failure to turn up to work on a Saturday had already told him that she had resigned, that she had already abandoned her job. There was no need to go any further, absolutely none.
20. The employee was a good employee. When she first advised that she was Adventist he gave no thought to accommodating her. He denied terminating her on 13<sup>th</sup> December, 1999 and failing to provide her with reasons for her termination.

He removed the punch card when he got in on the morning of 13<sup>th</sup> December because he knew he had the matter to deal with.

21. The employee's request for Saturday off is against company policy. The company policy is a 40 hour work week which includes ½ day on Saturdays. There are no exceptions. Other requests have been made which were denied. He made no attempts to contact Ms. Williams after 13<sup>th</sup> December, 1999 as everything was quite clear to him as to the position she had taken.

### **Discussion**

22. The court has had careful regard to the documentary evidence presented by the parties in support of their claims and in particular the exhibits MW1, MW2 and MW3 presented by the Employee.
23. MW1 appears to be undated but has at the top writing which shows it was written in December, 1999. The content of the letter assists the court with the possible date since it speaks of the Employee having been baptized on the 27<sup>th</sup> November, 1999, and requests the Employer to give the Employee Saturdays off commencing December, 4<sup>th</sup> 1999. The Court concludes that the letter was therefore written after Saturday 27<sup>th</sup> November, 1999 and prior to 4<sup>th</sup> December, 1999.
24. The Employer's letter in response to this letter (MW2) speaks of the fact that it is undated and the Employer denied the Employee's request to be given Saturday off and have her salary adjusted accordingly. The Employer also suggests that the Employee resign if she is unable to work on Saturdays.
25. In MW3 dated the same date as MW2, the Employee wrote to the Employer indicating that she worked with the Employer for 17 years during which she never had any problem with the schedule. She reiterated that she had chosen as a Adventist to worship only on a Saturday and that her request was not to have her services terminated but rather to be given the Saturday off. She stated that she was not prepared to resign and that she did not believe that anyone should be discriminated against because of their religious belief.
26. The Employee gave evidence that she had failed to work on Saturday 27<sup>th</sup> November, 2001 when she converted and for the Saturdays thereafter. Her evidence is that she had not worked for three Saturdays including the date she had converted. A review of the calendar year 1999 shows that there are in fact three Saturdays between the 27<sup>th</sup> November, 1999 and 11<sup>th</sup> December, 1999 inclusive.

This court therefore believes the Employee's evidence regarding her absence from work on Saturdays, and prefers her evidence to that of the Employer who stated that she had been absent for at least five Saturdays prior to her termination.

27. Both parties gave evidence that the Employee had been a good worker prior to her termination on 13<sup>th</sup> December, 1999 and the Employer indicated that in the six months prior to her termination he had no reason to complain about any aspect of her employment.
28. Having failed to turn up to work on three consecutive Saturdays without permission from the Employer is indeed contrary to the Employee's agreed terms and conditions and in so far as it was done without the Employer's permission could be considered misconduct within the Labour Code.
29. The court is however very mindful that at the time the Employee was terminated by her account (which the court accepts) she had been absent for only three such days. The court is of the view that even if the Employer's evidence is accepted that she had been absent for five consecutive Saturdays, this situation would not have justified the Employer in summarily terminating her employment or indeed requiring her to resign.
30. With regard to the events which occurred on 13<sup>th</sup> December, 1999 the Employee's evidence is that she was summoned to the Employer's office and advised that she no longer worked there and not to return to the storeroom. She requested a letter of termination but was told that none would be given as she had fired herself. She then left the premises.
31. The Employer disputes that and says that the Employee was never told to leave. Her absence was discussed and she was asked to resign after which she left.
32. This court having had regard to the Employee's letters to the Employer MW1 and MW3 does not accept that the Employee left the job after she was requested to resign during a discussion of her absence. The Employee's letter of December 9<sup>th</sup> 2003 makes clear that she was not interested in resigning and that she was asking for an adjustment to her working conditions.
33. Further, the Employer admitted that prior to the Employee's arrival at work on Monday 13<sup>th</sup> December, he had removed her punch card from the storeroom so that she was unable to punch in as usual when she arrived at work on Monday 13<sup>th</sup> December. On cross examination he stated that it was necessary to remove the Employee's card that morning to have her come to the office. He also stated on re-examination that the reason why the punch card was removed was that Ms. Williams was not there and he knew he had the matter to deal with.

34. This court finds it difficult to accept that the Employee's punch card was removed in order to have her go to the office when there was an intercom system in place as the Employer stated. The court is of the view that the inference to be drawn from the evidence is that the Employer had already concluded that he would deal with the Employee's absence the previous Saturdays by terminating her employment and therefore removed her punch card as she would not require it any further.
35. The court is also mindful that the Employer several times stated in his evidence that it was not necessary to provide the Employee with a termination letter since she had terminated herself by failing to turn up to work on Saturday, and concludes therefore that this view contributed to the Employer removing the Employee's punch card as he was convinced that she had no further use for it.

### **Decision**

36. Section C59 of the Code provides that an employee has a right not to be unfairly dismissed and that a fair dismissal must be based upon misconduct of the nature which indicates that the employment relations cannot reasonably be expected to continue.
37. Based on the facts, this court does not accept that the Employee's failure to report for work on the three consecutive Saturdays that she admitted and the court accepts she did not turn up for work a sufficient basis upon which her employment could be fairly terminated by the Employer.
38. The court is of the view that her Employer formed the view that the Employee's failure to turn up to work on three consecutive Saturdays meant that she had chosen to abandon her job. He therefore removed the punch card prior to her arrival at work since she no longer needed to be in the storeroom having abandoned her job. The court is of the view that the Employer in effect summarily dismissed the Employee in circumstances that did not warrant a summary dismissal and therefore finds the dismissal to be unfair.

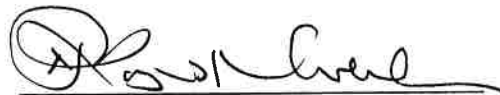
### **Award**

39. The Employee having been unfairly dismissed is entitled to compensation under the following heads:

- (a) **Immediate loss including notice pay:** The Employee gave evidence that she worked for the sum of \$565.00 per week. She was given no notice so she is awarded \$565.00 under this head. The employee also gave evidence that she obtained employment on 20<sup>th</sup> December one week after she was terminated so that she is awarded the sum of \$565.00 for her loss until she obtained new employment. The total under this head is therefore **\$1,130.00**.
- (b) **Loss of protection of employment:**  
The evidence of the Employer is that the Employee commenced employment on 13<sup>th</sup> April, 1983. She is therefore entitled to severance for the period 13<sup>th</sup> April, 1983 to December 13<sup>th</sup> 1999 a period of 16 years and 8 months. The Employee's daily rate is \$94.16 X 200 (16 2/3 years) for a total of **\$18,832.00**.
- (c) **Future Loss:** No award is made under this head as the employee gave evidence that she obtained employment a week after she was terminated at a higher salary than she previously obtained.
- (d) **Manner of dismissal.** No award is made under this head.

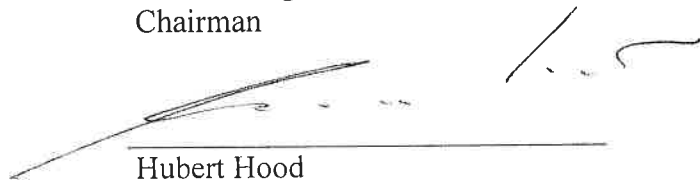
The Employee is therefore awarded the total sum of **\$19,962.00** to be paid by the Employer within one month from the date of this decision.

Dated the 27<sup>th</sup> day of June, 2006.



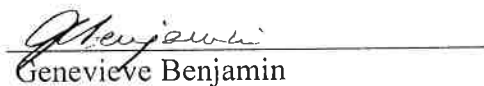
Nelleen Rogers Murdoch  
Chairman

I concur



Hubert Hood  
Member

I concur



Genevieve Benjamin  
Member