

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 16 of 2004

BETWEEN:

COLETTE McMASTER Employee

and

ROYAL ANTIGUAN HOTEL Employer

Before:

The Hon. Norris Scholar	Chairman
The Hon. St Lawrence DeFreitas	Member
The Hon. Glendina McKay	Member

Appearances:

**Mr. George Lake of Lake & Kentish - Attorney-at-Law
for the Employee**

**2007: October 25,
2009: November 30**

JUDGMENT

SCHOLAR N:

- [1] By a Reference and her Employee's Memorandum both filed on October 19, 2004 it is the Employee's view that she was unfairly dismissed. As a consequence, she claims that she is entitled to certain awards from the Employer.

- [2] The Employer was notified of the date of the hearing of this matter. Prior to this notification it was requested to file its Employer's Memorandum. None was filed. The Employer or any person on its behalf did not appear and was not represented.

BACKGROUND:

- [3] The Employer is the owner of a hotel in Antigua and Barbuda. Sometime in 1987 the Employee commenced her employment with the Employer. The last position which she held with the hotel was that of a Receptionist.
- [4] The Employee filed a Witness Statement on January 13, 2005. In that statement she stated that she earned an average weekly wage of \$450.00.
- [5] She recalled the events of January 06, 2003. She was at work on that date. According to her, she was summoned to a meeting with the hotel's General Manager, Mr. Jeffers. He asked her if she had collected foreign currency from a guest of the hotel as a result of an all inclusive package which she sold to the same guest. To this, the Employee answered in the affirmative.
- [6] She further told Mr. Jeffers that she purchased the foreign exchange for a friend at the prevailing exchange rate which was stipulated by the Employer. The Employee further stated that this was a **“common practice amongst members of staff.”**

- [7] Upon hearing what the Employee stated, Mr. Jeffers requested of her to leave the meeting for a few minutes. She obliged. She returned to meet with Mr. Jeffers. According to Ms. McMaster, Mr. Jeffers demanded that she resign her employment with the hotel as a consequence of her purchase of the foreign exchange and should she fail to do so, the hotel would summarily dismiss her.
- [8] She gave evidence that she was given a pen, a portion of hotel stationery, and was told by Mr. Jeffers to write her resignation on the same stationery.
- [9] To Mr. Jeffers' demand, Ms. McMaster wrote the following words on the stationery.
- "January 06, 2003*
- I Collette McMaster resign as of today immediately.*
- C. McMaster "*
- See Exhibit "CM - 1"

THE ISSUES

- [10] The following are the relevant issues:
- (i) **Where an employee is threatened by the employer that if she did not resign she would be dismissed and the threat causes the resignation do these circumstances amount to a dismissal in law?**
 - (ii) **If the employee is held to be dismissed what is the measure of damages to which she may be entitled.**

EMPLOYEE'S LEGAL SUBMISSIONS

[11] Mr. George Lake, Attorney-at-Law for the Employee submitted that the Employee was constructively dismissed. No authorities were cited in support of his submission.

THE LAW

[12] C 56 of the Labour Code states as follows:

“C 56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any employee without just cause.”

C 58 (i) (a) and (2) of the Labour Code reads as follows:

“C 58 (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);
(c);
(d);
(e);

Provided, however, that there is a factual basis for the assigned reason.

(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 the employer 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."

C 59 (1) (a) of the Labour Code reads as follows:

"C 59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct 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;

(b);

(c);

[13] Section C10 (1) of the Labour Code states as follows:

“(1) Upon termination by an employer of an employee’s employment subsequent to the expiration of the latter’s probation period, the employer shall, within seven days of the termination or notice thereof, furnish to such employee a written statement of the precise reason for termination.

(2).....

(3).....

[14] In the textbook entitled “**A Practical Approach to Employment Law**”, **Seventh Edition**, Oxford University Press, London, **2005**, authored by **John Bowers, Q.C.** the learned author states *inter alia* at **page 323** as follows:

“Resignation under threat the Courts are understandably reluctant to hold that there has been no dismissal where an employee is prevailed upon to resign under threat that if he does not do so, he will be dismissed....”

[15] There are a number of cases which exemplify this principle of law. They start with **East Sussex County Council v Walker (1972) 7 I.T.R.280**. In that case, a school cook was invited to resign. She was informed by the Employer that her contract was to be terminated and that such determination should be brought about by her own letter of resignation which she subsequently wrote.

Brightman J. said at **page 281** *inter alia* as follows:

“In our judgment, if an employee is told that she is no longer required in her employment and is expressly invited to resign, a court of law is entitled to come to the

conclusion that, as a matter of common sense, the employee was dismissed....”

Then the Judge continued *inter alia* as follows:

“Suppose that the employer says to the employee, “Your job is finished. I will give you the opportunity to resign. If you don’t you will be sacked.” How, we would ask, is it possible to reach a conclusion other than that the employment is being terminated by the employer, even though the employee takes the first and more respectable alternative of signing a letter of resignation rather than being the recipient of a letter of dismissal? We feel that in such circumstances, there really can be no other conclusion than that the employer terminated the contract.”

- [16] **Scott v Formica Ltd [1975] I.R.L.R. 104** concerned the termination of the employment of a process worker who was sought to be transferred by his employers to a job in the waste fuel boiler house. What happened was that he refused the suggested transfer and, although management tried to persuade him and the union representatives said that they also tried to persuade him, he stuck to the refusal and was eventually told that he must resign or be dismissed. The Industrial Tribunal said, at p. 106:

“Accordingly his employment terminated with effect from October 18, 1974. The company disputed he was dismissed because it was felt that he had in fact resigned. The tribunal finds that Mr. Scott was dismissed. Even if the word “resigned” was used at some stage in the final

interview, it was a forced resignation. He was given the choice of resignation or being dismissed. Clearly the company terminated Mr. Scott's employment."

[17] In **Pascoe v. Hallen [1975] I.R.L.R. 116**, a concise statement of the principle of law is contained in the headnote. It reads inter alia as follows:

"The respondents' factory manager had used his utmost persuasion to get the applicant to resign. She had been led to believe that if she did not resign voluntarily she would be dismissed. If an employer gives an employee the alternative of resigning or being dismissed, and the employee opts to resign, there is a dismissal in law."

Issue No. 1

Where an employee is threatened by the employer that if she did not resign she would be dismissed and the threat causes the resignation do these circumstances amount to a dismissal in law?

[18] In this case, the Employer gave the Employee an ultimatum which was that if she did not resign she would be dismissed. Although the Employee took the initiative to resign, **"there really can be no other conclusion that the Employer terminated the contract in accordance with Section C10 (1) of the Labour code."**

See Brightman J. in **East Sussex County Council v Walker (op cit) at Page 281**. In these circumstances, this Court finds that the Employee was unfairly dismissed.

Issue No. 2

If the employee is held to be dismissed what is the measure of damages to which she may be entitled.

[19] An Employee who is unfairly dismissed may be entitled to certain awards under specific established headings.

(a) Basic Award

The Employee worked for the Employer for about 15 years. Her last rate of pay was \$450.00 per week. Her daily rate is \$64.11. The sum due to her under this heading is $(\$450.00 \times 52 \div 365) \times 180 = \$11,539.80$.

(b) Immediate Loss

The Employee obtained suitable alternative employment on February 04, 2003, one month after having being dismissed. She is entitled to \$1,923.28.

(c) Manner of Dismissal

No award is made under this heading.

(d) Future Loss

The Employee obtained suitable alternative employment at Jumby Bay Resort. In these circumstances, no award is made under this heading.

Conclusion

[20] The Employer shall pay to the Employee **\$13,463.08** on or before December 30, 2009. There shall be no order as to costs.

Dated the 30th day of November, 2009

I agree

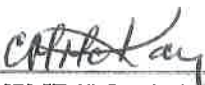


NORRIS O. SCHOLAR
Chairman



LAWRENCE DeFREITAS
Member

I also agree



GLENDINA MCKAY
Member