

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 17 OF 2004

BETWEEN:

KIMBERLY MARCIA LEWIS

Employee

and

TRADE WINDS HOTEL LTD

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Samuel R. Aymer

Member

The Hon. Glendina M. McKay

Member

Appearances:

**Mr. George Lake, of Lake & Kentish, Attorneys-at-law for the
Employee**

Ms. E. Ann Henry, Attorney-at-Law for the Employer

2007: November 20

2008: November 20

JUDGMENT

PILGRIM, P:

HISTORICAL BACKGROUND

- [1] Kimberly Marcia Lewis (hereinafter referred to as “Mrs. Lewis”) the Employee herein represents a typical Caribbean national who was born in

one country but left that country to seek employment in another country. Some years ago she emigrated from Guyana to Antigua and Barbuda. She subsequently found employment as a cook with Trade Winds Hotel Ltd, the Employer herein. She worked as a cook with the Employer from May 14, 2001 to September 12, 2003. She earned a weekly wage of \$405.00. In addition to her weekly wage, she earned four (4) service charge points. No evidence was led by either party to show the relationship between these service charge points and her basic weekly wage.

- [2] Sometime on or about of March 12, 2003 whilst she was working as a cook, Mrs. Lewis slipped on the Employer's kitchen floor. As a consequence, she injured her right shoulder. She notified her employer. On the following day, March 13, 2003 she sought medical attention.

Duration of her illness

- [3] According to the evidence Mrs. Lewis first attended a medical physician at Holberton Hospital in St. John's in Antigua on March 14, 2003. That physician granted her a leave of absence from work by reason of illness. In his opinion, she would have been fit to resume work on March 17, 2003. (See TW-7)
- [4] She subsequently sought and obtained medical attention from Dr. K. Singh MB BS MS (Orthopaedics) F.I.C.S, Consultant Orthopaedic Surgeon of Ortho Medical Associates. He first examined her on March 19, 2003. He opined that she would have been fit to resume her duties as

a cook on March 26, 2003. (See TW- 7)

- [5] She then returned to the medical office of Dr. K. Singh on March 31, 2003. On that day, Dr. K. Singh granted a further extension of a leave of absence due to illness and for her to resume work on April 7, 2003. (See TW-7)
- [6] Two additional leave of absences due to illness were granted by Dr. K. Singh to Mrs. Lewis. These were pursuant to the issuance of Medical Certificates dated April 05, 2003 and April 24, 2003. In the later certificate, Dr. K. Singh opined that Mrs. Lewis would have been fit to resume work on May 19, 2003. (See TW-7).
- [7] On May 19, 2003, Mrs. Lewis obtained a further extension of a leave of absence due to illness from Dr. R. Bekal MB BS, F.R.C.S. (Eng) Consultant Surgeon. On that day he opined that Mrs. Lewis would be fit to resume work on June 3, 2003. (See TW-7). On June 2, 2003 she returned to Dr. R. Bekal who extended her leave of absence until June 16, 2003. (See TW-8)
- [8] Dr. K. Singh issued two medical reports. They are dated April 25, 2003 and June 19, 2003. In his report of April 25, 2003, Dr. K. Singh's diagnosis of Mrs. Lewis's was as follows:
- “1. *Post traumatic impingement syndrome with painful arc and restriction of all movements including abduction after 20 degrees.*
 2. *Supra-spinatus tendonitis.*

3. *Injury to rotator cuff right shoulder.”*

In his opinion as at April 25, 2003 *“Ms. Kimberly Lewis has recovered considerably on account of treatment offered and has regained more than 90 degrees abduction and has improved on other movements.”*

- [9] In his medical report dated June 19, 2003, Dr. K. Singh opined *inter alia* as follows:

“Lately she has been evaluated by me on 18th June, 2003 when she had regained 140 degrees abduction with gradual increase in all her functioning range of motion in her right shoulder joint.”

- [10] The medical reports of Dr. K. Singh revealed that Mrs. Lewis’ medical condition as at June 18, 2003 was improving.
- [11] In the interim, Mrs. Lewis was requested by her Employer to submit herself to be examined by Dr. Patrick Matthew, a physiotherapist. She was examined by Dr. Matthew. He recommended her to undergo a Magnetic Resonance Imaging (MRI) examination in Trinidad & Tobago. She subsequently journeyed to Trinidad & Tobago on May 11, 2003. She returned to Antigua & Barbuda on May 13, 2003.
- [12] Whilst in Trinidad & Tobago she underwent the MRI procedure (presumably of the right shoulder, since the actual MRI report was not attached to Dr. Matthew’s report dated June 13, 2003). Dr. Matthew in

his report was of the opinion that Mrs. Lewis would be fit to resume duties on June 16, 2003.

- [13] Notwithstanding Dr. K. Singh's opinion as expressed in his medical report dated June 19, 2003, that Mrs. Lewis was experiencing a "**gradual increase in her all functioning range of motion in her right shoulder joint.**", he was still of the opinion that "**she is temporarily disabled in the full functions of her right shoulder because of her occupational injury.**" Although Dr. K. Singh recommended that Mrs. Lewis obtain physical therapy three (3) times per week, he did not state the duration of the physical therapy. He did not extend her leave of absence due to the injury which she previously sustained.
- [14] Mrs. Lewis afterwards consulted Dr. Raymond Daoud MD LMCC on June 23, 2003 and on or about June 30, 2003. At the later review Dr. Daoud was of the opinion that her abduction angle had increased from 80 degrees to 120 degrees. He reported that Mrs. Lewis "**declared that her pain was improved by 60%.**" As well, he advised Mrs. Lewis that she should be reviewed by "**her orthopaedic surgeon for final decision**". Dr. Daoud wrote a medical report dated July 6, 2003. He did not state a date on which in his opinion he would have regarded Mrs. Lewis to be fit to resume work.
- [15] Mrs. Lewis was not satisfied with the advice rendered by her own medical adviser Dr. Raymond Daoud, that she should "**see her orthopaedic surgeon for final decision**". Presumably, he meant Dr. K. Singh.

- [16] Mrs. Lewis decided for certain reasons to journey to Guyana in order that she would be able to obtain further medical attention. Her reasons for so doing were articulated by her in answers to Ms. Henry, Counsel for the Employer. She stated *inter alia* as follows:

“No doctor in Antigua referred me to Guyana for medical reasons. I informed Mrs. Carter that I was going to Guyana to see a bone specialist because Guyana is where I was born. My mother told me there are good bone specialists in Guyana..... I went to Guyana. I saw Dr. Placido who is a bone specialist in Guyana. Dr. Placido sent a medical certificate to Antigua”.

- [17] Dr. Placido submitted two medical certificates. They are dated July 12, 2003 and August 9, 2003. In each instance, he granted her a leave of absence for 30 days duration.
- [18] Dr. Placido also authored a medical report dated August 21, 2003. In that report he stated *inter alia* as follows:

“Because of the chronic injury and the cervical ribs, I recommend this patient should be out of her job for the next six months,.....”

- [19] Armed with Dr. Placido’s medical report, the Employer through its General Manager, Ms. Cheryl Carter dismissed the employee by way of a letter dated Friday September 12, 2003.

[20] In the letter of dismissal which was admitted as Exhibit KL-3 (a) Ms. Carter wrote to Mrs. Lewis and stated *inter alia* as follows:

“Earlier this week, I received a report from your [orthopaedic] surgeon in Guyana, dated the 21st August, 2003 which indicates that you will not be available for work for the next Six (6) months.”

[21] After her dismissal on September 12, 2003 the Employee’s evidence is that ***“she was at home struggling”***. She stated that she wrote applications to different business places including Jolly Beach, Sandals, Halycon Cove, Blue Waters and Pineapple Beach. No copies of any correspondence to those establishments were ever produced to the Court.

[22] (i) She obtained a part-time job at Jolly Beach (not as a consequence of her application) in or about March 2007 for six (6) months. She thereafter worked at Goddards Catering as a cook for two (2) weeks. In answer to Ms. Henry, she stated that she worked at Goddards for three (3) years. Subsequent to the Goddards experience, she found employment at Commissioners Grill, a restaurant in St. John’s in Antigua.

(ii) An examination of her Witness Statement which was admitted in evidence states *inter alia* at paragraph 5 as follows:

“I did not obtain any work until January 2005 and at that time I obtained part time work.”

LEGAL PROCEEDINGS

- [23] An Employee's Reference in accordance with Section 7 (1) (c) of the Industrial Court Act Cap. 214 of the Laws of Antigua & Barbuda, (**hereinafter referred to as "Cap. 214"**) was filed in the Industrial Court on October 19, 2004.
- [24] On the same date Lake and Kentish, Attorneys-at-Law for the Employee filed its **Employee's Memorandum** (hereinafter referred to as "**the said Memorandum**"). At paragraph 10 of the said Memorandum, they allege that the Employee's employment was terminated by a letter from the Employer dated September 12, 2003. Further, they are of the view at paragraph 13 of the said Memorandum that her dismissal is unfair and is contrary to the Antigua & Barbuda Labour Code Cap. 27, of the Laws of Antigua & Barbuda, Revised Edition, 1992 (hereinafter referred to as "**the Labour Code**") and the practices of good industrial relations. No particular section of the Labour Code was cited by the Employee's Counsel.
- [25] By a *Memorandum of the Employer* filed on January 20, 2005, Ms. Henry, Attorney-at-Law for the Employer claims that "**by reason of the Employee's apparent and asserted unfitness to resume her duties the Employer terminated the Employee's employment in accordance with**" (i) C 16 (2) of the Labour Code; and (ii) having regard to certain practices of good industrial relations. In essence Ms. Henry submits that Mrs. Lewis was not unfairly dismissed.

[26] In accordance with the powers of the Industrial Court, a Witness Statement of the Employee was filed on October 10, 2007. In similar fashion, a Witness Statement on behalf of the Employer was deposed to by Ms. Cheryl Carter, the Managing Director on November 16, 2007.

[27] The Employee was the sole witness who gave evidence on her behalf. Similarly Ms. Cheryl Carter was the sole witness who was called in support of the Employer.

TRIABLE ISSUES

[28] *The matters which fall for a determination are as follows:*

- (i) *Did the Employer act reasonably in dismissing the Employee?*
- (ii) *Did the Employee cause or contribute to the dismissal?*
- (iii) *In the event that the Employee was unfairly dismissed what compensation should be paid to her?*

ARGUMENTS FOR THE EMPLOYER

[29] Ms. Henry submitted that “the *turning point for the Employer was the receipt of the report from Dr. Placido.*” She asserted that Dr. Placido’s report was received by the Employer on September 9, 2003. Having regard to Dr. Placido’s opinion that the Employee would not be fit to resume work before February 2004, the Employer took the decision to dismiss the Employee.

[30] Ms. Henry drew the Court’s attention to paragraph 28 of Ms. Carter’s Witness Statement. That dealt with the imminent high tourist season. At

paragraph 27 of the Witness Statement, the need of the remaining kitchen staff to work overtime in Mrs. Lewis's absence was referred to by Ms. Henry.

- [31] Ms. Henry further submitted that C16 (ii) and C40 of the Labour Code are relevant provisions which the Court should take into consideration. According to her, the Employee did receive \$20,000.00 in full and final settlement of her claims inclusive of severance. The terms of the settlement were more particularly set out in a Release which was signed by the Employee. This Release was however not put forward in evidence before this Court for scrutiny.
- [32] Ms. Henry further submitted that in accordance with C58 (i) (e) of the Labour Code, the dismissal of the Employee was not unfair. According to Ms. Henry, the Employer had no duty to consult with the Employee before she was dismissed. In support for this submission she referred the Court's attention to C16 (ii) of the Labour Code and the decision of this Court in **Malcolm Thomas v E & E Aviation & Shipping Ltd No. 27 of 1993**.
- [33] In the **Malcolm Thomas'** case the employee was employed with the employer for ten (10) months during which time he obtained different leave of absences from work for 26 days. There were certain circumstances which the Court took into consideration in that case in arriving at its decision that it was right for the Employer to conclude that any further absences from work would have rendered the employee unfit

to continue in employment. As a consequence the court held that the employer did not act unfairly in terminating the employee's employment.

- [34] Those circumstances referred to at paragraph 33 were stated by the then President Radford Hill at page 4 of the judgment. He stated *inter alia* as follows:

“The Employer was at this time experiencing severe economic downturn in its business and to cope with this had instituted a roster system beginning September 1991 by which the Employee was required to work every alternate two weeks. During the period under review, he was rostered to work on the 5th October to the 18th October and again on the 5th November 1991 to the 19th November 1991. As can be seen from the evidence he was not available to work both periods he had been rostered to work.”

- [35] There was no evidence which was led by the Employer in the case presently before this Court that the hotel was experiencing any severe economic and/or any other downturn in its business. The length of the employee's period of employment in the *Malcolm Thomas's case* (only ten months) together with the urgency expressed by the employer for him to work are quite different from the facts which are presently before this Court.

[36] In addition, it does not appear from a reading of the judgment in **Malcolm Thomas** that the Court was requested to examine the issue of whether or not some consultation between the parties was required before dismissing the employee.

[37] The provisions of C 16 (ii) of the Labour Code clearly contemplate a situation where medical and/or other evidence manifestly suggests that the employee is unable to permanently perform his duties under his contract of employment. Upon the operation of this event, then the provisions of C 16 (iii) become applicable. In the circumstances of this case especially where no permanency exists, this Court respectfully declines to accept Counsel for the Employer's submission that the provisions of C 16 (ii) are helpful to an understanding of the basis of the employee's dismissal. For these reasons as well and with the greatest respect I decline to be persuaded by the decision in the **Malcolm Thomas' case**.

ARGUMENTS FOR THE EMPLOYEE

[38] Mr. George Lake, Counsel for the Employee submits that the issue which this Court should determine is whether the Employer acted reasonably. He asserted that *"the Court must look at the common law principles."* He supported his submission by reference to the textbook entitled **"The Law of Dismissal in Canada", Second Edition by Howard A. Levitt, Canada Law Book Inc; at page 167.**

- [39] Mr. Lake is of the view that the Employer should have made enquiries of the Employee. He requested this Court to take into consideration a report of Dr. Jason Belizaire dated September 12, 2003. In his opinion this report must have been received by the Employer before it dismissed the Employee by letter of the same date.
- [40] Having examined the evidence of both parties, this Court finds as a fact that Ms. Carter did not receive and/or have any knowledge of Dr. Belizaire's report before the Employer took the decision to dismiss the Employee. There is therefore no merit in the submission by Mr. Lake, Counsel for the Employee that Ms. Carter having received Dr. Belizaire's report ought to have requested the Board to re-examine its decision to dismiss the Employee. This Court agrees with Ms. Henry's submission that in her words *"the factual basis on which termination was taken was grounded in Dr. Placido's medical report"*.
- [41] In addition, Mr. Lake submits that the Court should examine such factors such as (a) the duration of the Employee's illness, (b) the number of persons who performed similar duties as the Employee; and (c) whether or not the Employer has a duty to communicate with the Employee before taking a decision to dismiss her. Counsel also cited **B. Roustoby v British Cocoa Mills (Hall) Ltd [1973] I.R.L.R. 103** and **Marshall v Harland and Wolff et al [1972] 2 ALL E.R. 715**.
- [42] In **B. Roustoby v British Cocoa Mills (Hall) Ltd** (op cit) the employer dismissed the employee in circumstances where the employer was unsure of the employee's true medical condition. The employee had been

previously submitting medical certificates but subsequently ceased to do so. In those circumstances, the Court came to the conclusion that the employee's dismissal was unfair.

Roustoby's case does not assist the employee in this case as she did submit medical certificates and a medical report prior to her dismissal. In these circumstances, that case is not helpful to this Court in a determination of the issues.

- [43] Marshall's case deals with frustration of a contract and with respect has nothing to do with this instant case: - see the observations of **Phillips J. in *Spencer v Paragon Wallpapers Ltd.* [1977] ICR 300 at page 302.**

THE LAW

- [44] C 56 of the Labour Code grants a right to an Employee not to be unfairly dismissed without just cause in circumstances where his probationary period has ended.

- [45] C 16 and C 16 (ii) of the Labour Code states *inter alia* as follows:

"C 16:

Each employee is entitled to leave on workdays, or parts thereof, during which he is ill or otherwise physically incapacitated for work:

Provided, however, that

- (i)**

(ii) *“ in the event that, in the opinion of his employer the extent of such leave taken renders the employee unfit to continue in his employment and the employer terminates the employment therefor, the employee shall receive compensation calculated in the manner specified under part 4 or a collective agreement in force relating to compensation for severance pay.”*

[46] Pursuant to C 58 (i) of the Labour Code dismissals of a certain nature shall not be unfair if the reason assigned by the employer therefor:

- (a);
- (b);
- (c);
- (d); or

“(e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held:

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

[47] In accordance with **C 58 (2) of the Labour Code** the test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances; which were known to the employer on the date of dismissal the employer acted unreasonably or reasonably.

THE DECISION

[48] The reasons adumbrated by the Employer why the Employee was dismissed are stated in the letter of dismissal dated September 12, 2003.

It referred to Dr. Placido's report which Ms. Carter referred to as having been received by her earlier on during the week of the dismissal.

- [49] It is very clear from the letter of dismissal that the Employer's insurers were dissatisfied with the Medical Certificate from Dr. Placido in Guyana dated July 21, 2003. According to Ms. Carter at page 2 of the dismissal letter she wrote *inter alia* as follows:

"As you are aware, on the 21st July 2003 our Insurance Company, Caribbean Alliance wrote to Dr. G. Del Toro Placido confirming receipt of the Medical Certificate and advising that it would not be honoured UNTIL YOUR RETURN TO ANTIGUA WHEN YOU WOULD BE REQUIRED TO BE EXAMINED BY A DOCTOR OF THEIR CHOICE. This latter matter was brought to your attention by me when you telephoned me on the 28th July, 2003 at which time I asked you to go in to see our Insurers."
(the emphasis in capitals is the Court's)

- [50] Earlier in the letter of dismissal, Ms. Carter explained the manner in which the Employer's insurers arranged for Mrs. Lewis to be seen by its Physical Therapy specialist Dr. Patrick Matthew. She stated *inter alia* as follows:

"In the interim, you expressed dissatisfaction with Dr. Singh's report AND YOU WERE ADVISED BY OUR INSURANCE COMPANY TO CONSULT

WITH Dr. PATRICK MATTHEW WHO RECOMMENDED THAT YOU GO TO TRINIDAD TO HAVE AN MRI DONE. You proceeded to Trinidad on the 11th May returning to Antigua on the 13th May." (the emphasis in capitals is the Court's)

[51] In the letter of dismissal Ms. Carter continued to state that she received the report from Dr. Matthew as a consequence of Mrs. Lewis adhering to the instructions of the Employer's insurers.

[52] In Ms. Carter's cross examination by Mr. Lake, she stated *inter alia* as follows:

"AT NO TIME DID THE EMPLOYER INFORM THE EMPLOYEE THAT HER JOB WAS AT RISK IF SHE COULD NOT RESUME EMPLOYMENT. At no time did I meet with the Employee to tell her that her job was in jeopardy if she was unable to resume work. I did not know how to contact her during the 9th to the 12th of September, 2003" (the emphasis in capitals is the Court's)

[53] In further answer to Mr. Lake with respect to how the letter of dismissal was communicated to the Employer, Ms. Carter stated *inter alia* as follows:

"I gave instructions to the driver in the morning at about 9:00 o'clock TO DELIVER THE LETTER

OF DISMISSAL TO THE EMPLOYEE. The driver returned to the hotel and informed me that he had delivered it to the Employee's home." (the emphasis in capitals is the Court's).

[54] I saw and examined very closely Mrs. Lewis and Ms. Carter as they gave their evidence. Mrs. Lewis is requesting this Court to believe her evidence that she did not receive the letter of dismissal before she attended Dr. Jason Balizaire on September 12, 2003. The Court is not in agreement with her contention. In any event, the report of Dr. Jason Belizaire is of no consequence whatever to a determination of the issues in this matter.

[55] Similarly, according to Ms. Carter's testimony, that since she gave the driver instructions on September 12, 2003 *"to deliver the letter of dismissal to the Employee"* then it is reasonable to conclude that she was in fact aware of the location of Mrs. Lewis's residence and how she may be contacted.

[56] At paragraph [38], Counsel for the Employee submitted two very paradoxical submissions. They relate on the one hand to an assertion that the Employer ought to have acted reasonably. On the other hand, Mr. Lake asserts a role for this Court to take into consideration common law principles.

[57] Principles of the common law generally have no application to a system of law which is governed by principles of unfair dismissal. The law has

rapidly developed since the days of master and servant. A few lines from the modern textbook "**Smith & Wood's Employment Law**", Ninth Edition by Ian Smith & Gareth Thomas, Oxford Unity Press, London 2008 would suffice to be cited in this regard. The learned authors state *inter alia* as follows:

"The common law on dismissal for cause is thus heavily qualified by statute and the modern statutory provisions owe little to the existing common law rules. For example at common law a dismissal would be lawful if the employer acted on reason A which was quite inadequate, but later found out about reason B which could in fact justify dismissal, but under the unfair dismissal legislation the relevant reason is the one upon which the employer acted at the time of the dismissal and not anything that he only discovered later."

Issue No. 1

Did the Employer act reasonably in dismissing the Employee?

[58] With the greatest respect, I find myself unable to agree with Ms. Henry's submission that there was no duty on the Employer to have any consultation with the Employee before a decision was taken to dismiss the Employee. There is some considerable force and merit in Mr. Lake's submission that in order to determine whether the Employer in its dismissal of the Employee acted reasonably then the Court must have regard to all of the circumstances of this matter inclusive of an examination of the issue whether or not the Employer should have consulted with the Employee prior to making its decision to dismiss her.

[59] I depart company with Mr. Lake however in the submission that this Court must examine common law principles outlined by him at paragraph [38] hereof. Common law principles are unmeritorious for the reasons outlined at paragraph [57] hereof.

[60] There are always two major considerations which Industrial Courts have to consider in matters of this nature. On one end of the spectrum is the economic and financial interest of the Employer. At the other end of the spectrum are the welfare and humanitarian needs of the Employee.

[61] In a normal case it is expected that an Employer would consult with an employee before it takes a decision to dismiss an employee upon grounds of ill health. Apart from considerations of general courtesy the main reason why consultation is necessary is to facilitate "*a discussion so that the situation can be weighted up, bearing in mind the employers' need for the work to be done and the employee's need for time in which to recover his health.*"

- See *Spencer v Paragon Wallpapers Ltd* [1977] I.C.R 301 at page 307 per Phillips J;

He continued to state *inter alia* as follows:

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all the circumstances, the Employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances."

- [62] Another reason why the consultative process between the two parties must take place before dismissing an employee for ill health reasons is that it affords the Employer an opportunity to ascertain and establish the true medical position. Such steps should however be sensible in the hope that facts and circumstances which were previously unknown may very well emerge to throw new light upon the situation.

See East Lindsey District Council v Daubney [1977] ICR 566

- [63] In **Williamson v Alcan (U.K) Ltd [1978] I. C. R 105 (E.A.T) Phillips J**, at pages 107-108 described the process of consultation by the Employer with the employee before dismissal on ill health grounds as:

"now so well-established and is such an elementary requirement of fairness and good practice, ..."

- [64] This Court is asked to make a determination as a matter of fact and judgment what consultation if any, was necessary or desirable between the Employer and the Employee. In addition, the Court must examine what consultation, if any, in fact took place and whether or not that consultative process was adequate in all the circumstances.

- **See A Links and Co. Ltd v Rose [1991] IRLR 353.**

- [65] Counsel for the Employer in her address to the Court stated that it was common ground that some exchange took place between the Employer and the Employee concerning the relevance of Dr. Placido's medical report from Guyana.

- [66] It is very clear according to the letter of dismissal that the Employer was concerned about the efficacy and usefulness of the medical report written by Dr. Placido in Guyana.
- [67] In the letter of dismissal the Employer expressed the view that Dr. Placido's report "*would not be honoured until (Mrs. Lewis) return to Antigua when (she) would be required to be examined by a doctor of (the insurer's choice).*"
- [68] It was therefore incumbent upon the Employer to make the necessary arrangements with its insurers and the Employee for her to be medically examined in Antigua or elsewhere by the doctor of the Employer's choice. This was done previously in the case of Dr. Matthew. This consultation was necessary to be facilitated and ought to have been convened by the Employer as is the usual custom in matters of this nature.
- [69] In addition, in accordance with the evidence of Ms. Carter, she was in a position to facilitate some discussion with the Employee; to ascertain how the Employee is coping, to discuss with her the present and imminent needs of the hotel, the impact of her illness upon the hotel, the need to have her medically examined, the need to have her return to work having regard to the imminent tourist season and in the circumstances, to ascertain whether she was in a position to return to work at the earliest opportunity. No one knows what may have transpired if a discussion of these matters had taken place between the two parties.

[70] Indeed Counsel for the Employer in her address submitted *inter alia* that the high tourist season would have commenced in November 2003 and the Board of the Hotel took the decision to terminate the Employee's employment.

[71] However, the Employer had ample time to put to the Employee the hotel's concerns that her services were necessary for the start of the tourist season. Apart from the evidence of Ms. Carter that an "***Executive chef worked a split shift essentially covering both shifts***", there is no further evidence given for the Employer that the Employee's absence was otherwise negatively affecting the Employer's business to such an extent that her employment should be terminated in accordance with C58 (i) (e) of the Labour Code.

[72] "***[I]t is only in the rarest possible circumstances that it is a good answer to a failure to consult and discuss that discussion and consultation would have been fruitless.***"

- **East Lindsey Council v Daubney [1977] ICR 567, per Phillips J at page 572.**

[73] The Employer never consulted with the Employee and the matter was never discussed with her prior to her dismissal. One thing is certain and that is, that if an employee is not consulted and given an opportunity to respond to the Employer's concern, an injustice may be done.

[74] I have considered all of the evidence given by both parties and have examined the submissions by Counsel for the Employer and Counsel for

the Employee. In addition, consideration was given to relevant cases, the views of certain textbook writers and the provisions of the Labour Code. I was also very mindful of Section 10 (3) of Cap. 214 in arriving at a decision which is based on the principals and practices of good industrial relations.

- [75] Having regard to the use of these criteria, I am not persuaded that the Employer acted reasonably in dismissing the Employee. This was not one of those “**rarest possible circumstances**” that discussion and consultation would have been superfluous. In all the circumstances of this case, this Court finds that the employee was unfairly dismissed.

Issue No. 2

Did the Employee cause or contribute to the dismissal?

- [76] There has also developed a practice in this Court that if an employee causes or contributes to his dismissal, the award will be reduced by the extent of his degree of culpability. An example of this practice is **Alexander Hughes v Antigua Brewery Limited Ref. No. 35 of 2002**. In that case **Maundy P** stated at page 12 of the judgment *inter alia* as follows:

“Consequently in behaving as he did and causing Mr. Hofman and Mr. Graef to so conclude and found the basis of the dismissal I would hold that the Employee contributed to the dismissal and did so to the extent of 50 per cent – both Mr. Graef and Mr.

Hofman should have taken some step to assure themselves that the Employee was genuinely asleep.”

[77] An Employee who is found to have been unfairly dismissed is entitled to be compensated for loss of earnings and other awards where appropriate. That employee however has a responsibility to mitigate the loss which has been sustained. If there are circumstances where the Court finds that the employee has failed to mitigate the loss, ***“the Court should make an appropriate deduction from the compensation for that loss”.***

- **See Antigua Village Condo Corporation v Jennifer Watt, Civil Appeal No. 6 of 1992 per Sir Vincent Floissac C. J; at page 5.**

[78] The efforts which the Employee said that she made in order to obtain alternative employment have been referred to at paragraphs **21** and **22** of this judgment. Counsel for the Employer submitted in the alternative to a finding of a fair dismissal that two and half years (2 ½) years was too long for Mrs. Lewis to have waited to find other suitable employment. She submitted further that in the existing working environment the employee should have found employment at an earlier time. No particular period was mentioned by her and no submissions were made in this regard by the Employee’s Counsel.

[79] Assuming that the employee is a good cook, she could have commenced her own employment during the period in which she states that she remained unemployed before she found another job. Her employment record after being dismissed is manifestly unclear. For example, she could not have been unemployed for six (6) months, remain unemployed

again, obtain employment at Goddards for 3 years placing the period well into 2008 and thereafter obtain employment at Commissioners Grill.

[80] This Court finds that the Employee did not deliberately set out to mislead the Court with respect to mitigating her loss but was genuinely mistaken. However, I am satisfied that the Employee ought to have made greater efforts to obtain alternative employment within a shorter time period.

[81] Mrs. Lewis gave evidence to justify why she visited Guyana to obtain medical treatment. The rationale for her decision to do so is stated at paragraph [16] hereof.

[82] Mrs. Lewis's journey to seek medical attention in Guyana must be viewed with some scepticism against the background that (a) as at June 18, 2003 her medical condition according to Dr. K. Singh was continuing to improve and (b) Dr. K. Singh being an Orthopaedic Surgeon had made no recommendation whatsoever that she should seek to be medically examined by another orthopaedic surgeon whether in Antigua & Barbuda, Guyana and/or elsewhere. In her answer to the Court, she stated *inter alia* as follows:

"I went to see Dr. Singh on my own initiative..... I did not get a letter from Dr. Singh to see someone else. Dr. Singh did not recommend me to see Dr. Placido in Guyana."

[83] In a modern industrial relations environment, this Court is of the view that Mrs. Lewis ought to have received some form of recommendation

from a medical practitioner for her to attend to be medically examined by another medical specialist so that a nexus could have been created. This is especially so having regard to the fact that she sought medical attention outside of the jurisdiction of Antigua and Barbuda.

[84] Mrs. Lewis herself seems not to have been satisfied at some late stage with Dr. Placido's medical report dated August 21, 2003 which granted her a leave of absence due to illness until February 2004. For it is somewhat of a very remarkable coincidence that on the same date of her dismissal being September 12, 2003, she also obtained medical attention from Dr. J. Belizaire. It seems most probable and this Court so finds that Mrs. Lewis was in receipt of her letter of dismissal on September 12, 2003, before she obtained medical attention on the same date.

[85] The medical report from Dr. Placido caused the Employer some natural understandable concern. The Employer very quickly made a decision to dismiss the Employee in circumstances which this Court holds was unfair to the Employee.

[86] This *“does not mean the Employee was without sin”* (see **Maundy P in Alexander Hughes** (op cit) at page 12 thereof. As stated by Counsel for the Employer, the turning point was the receipt of the report from Dr. Placido. This report caused the Employer to dismiss the Employee.

[87] Mrs. Lewis's behaviour in obtaining medical attention in Guyana in the manner that she did and having regard to the matters set out in **paragraph 84** hereof must be taken into consideration to lessen the award which this

Court would have otherwise made to her. In all the circumstances of this case, I hold that the Employee contributed to the dismissal to the degree of 25 per centum. In these circumstances, the Employer ought however to have discussed Dr. Placido's medical report and other matters with Mrs. Lewis before it took the decision to dismiss her.

Issue No. 3

In the event that the employee was unfairly dismissed what compensation should be paid to her?

THE AWARD

[88] The Employee is entitled to compensation for unfair dismissal under some of the established heads. The compensation which is to be awarded to her is as follows:

(a) **Basic Award for Loss of Protection**

The award under this heading is similar to that of severance. It consists of one day's pay at the Employee's last basic wage, for each month of her term of employment. The Employee worked for **42** months. Her daily wage was \$81.00. Her entitlement under this heading is **\$81 x 42 or \$3,402.00**. (No evidence was led as to the effect of the payment of the service charge and its impact upon her weekly wage.)

(b) **Immediate Loss**

It is the Employee's evidence that she was unable to find alternative employment for approximately 15 months. However with a greater

effort, it is this Court's finding that she should have obtained employment or self employment within 12 weeks. The award made under this heading is \$405 x 12 or \$4,860.00.

(c) **Manner of Dismissal**

No award shall be made under this heading. No evidence was led to show that the way in which she was dismissed makes her vulnerable in the job market.

(d) **Future Loss**

No evidence was placed before the Court to show whether the earnings from her new employment are less than those from her previous employer. Consequently no award is made under this heading.

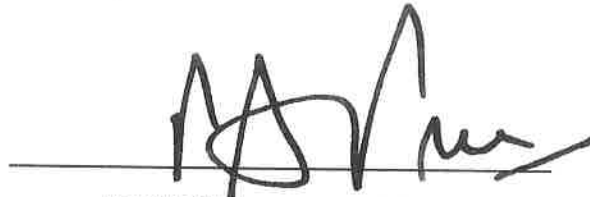
(e) **Notice Pay**

The Employee was summarily dismissed without notice. She is entitled to one week's Notice Pay or the sum of \$405.00.

[89] The Employer shall pay to the Employee the sum of \$6,500.25. This sum represents the gross award of \$8,667.00 less a deduction of **\$2,166.75** being the deduction of 25 per centum referred to at paragraph [87] above. It shall be paid to the Employee on or before the 31st day of December 2008.

[90] There shall be no order as to costs.

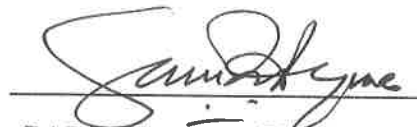
Dated the 20th day of November 2008

A handwritten signature in black ink, appearing to read 'Philip A. Pilgrim', written over a horizontal line.

PHILIP A. PILGRIM

President

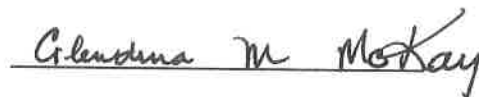
I have had the advantage of reading in draft the judgment of the President. I am in full agreement with it and for the reasons therein which he gives I too find in favour of the Employee.

A handwritten signature in black ink, appearing to read 'Samuel R. Aymer', written over a horizontal line.

SAMUEL R. AYMER

Member

I also agree.

A handwritten signature in black ink, appearing to read 'Glendina M. McKay', written over a horizontal line.

GLENDINA M. MCKAY

Member