

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 7 OF 2003

BETWEEN:

PAMELA MAYERS

Employee

and

**A.V. MANAGEMENT LIMITED
t/a ANTIGUA VILLAGE**

Employers

Before:

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

President
Member
Member

Appearances:

Mr Kelvin John, Attorney-at-Law, for the Employee
Kendrickson Kentish & George Lake, Attorneys-at-Law, for the Employers

2004: September 1, 2 & 3

JUDGMENT

Unfair Dismissal – highly strained relations between supervisor in charge of Housekeeping at hotel and three of her staff – Supervisor unable to control staff and frequent arguments and disharmony – Manager asked to intervene – at a meeting with the Employee Manager advised the Employee to resign and promised she will receive her Severance – Employee requested her Severance Pay – Severance paid the following day – manager drafted letter of resignation and forwarded

to Employee for signature – after receipt of her Severance Pay Employee refused to sign letter of resignation and filed this Reference alleging that she was unfairly dismissed and entitled to compensation for Unfair Dismissal.

- [1] Maundy, P.: By a Memorandum filed on March 11, 2003, Kelvin John, Solicitor for the Employee, alleges that on May 30, 2000, her employment was terminated by the Employers at a meeting with Mr Arthur Edmund, the General Manager of the Employers' resort. The Employee commenced working with the Employers in 1982 and at the time of the alleged dismissal she was in charge of the Housekeeping Department with a salary of EC\$ 2,500.00 per month. It was also suggested that at the said meeting the Employee was advised to resign but declined and that the Employers failed to provide her with a written statement as to the precise reasons for her termination within seven days thereof as provided by Section 10 of the Antigua and Barbuda Labour Code Amendment. The Employee claimed damages for Unfair Dismissal and Costs.

- [2] By their Memorandum filed on April 15, 2003, Lake & Kentish, Solicitors, on behalf of the Employers, categorically denied the allegations of the Employee and contend that the Employee's employment was voluntarily terminated by her on terms mutually agreed with the Employers. The Employers further allege that the above was agreed at a meeting of the parties on May 30, 2000 and that they further agreed that the Employee would issue a letter of resignation, a draft of which would be prepared by the General Manager for her approval and signature.

The allegation that the Employee was being coerced into resignation was not pleaded in her Memorandum by the Employee and seems to be an afterthought; it was raised for the first time at the Hearing – the

Employers were deprived of the opportunity to properly prepare a defence to this allegation.

Historical Background

- [3] The Employee commenced working with the Employers in 1982 at their hotel at Dickenson Bay, St John's, Antigua, and did so until May 30, 2000, at which time she was Head of the Housekeeping Department with a staff of thirteen. It was the Employee's duty to guide her staff, instruct them how to clean the rooms, greet guests and general performance.
- [4] For a time after becoming Supervisor the Employee's performance was satisfactory – when there was a problem with the staff or the work was not done properly she would speak to them and if this was not successful she would refer the matter to the General Manager, Mr Arthur Edmund, who had the Power of Hire and Fire. After an interim disharmony developed between the Employee and two members of her staff which became known to some of the Directors, the General Manager and guests. A letter was sent by the Board to the General Manager asking what he proposed to do with the Employee. Mr Edmund summoned the Employee to a meeting in the presence of Mr Donni Dowe, the Assistant General Manager, (now General Manager) and had a conversation with her in the presence and hearing of Mr Dowe.
- [5] The Employee did not call any witnesses to support her version of what transpired at the meeting and her account of what took place was very different from that of the General Manager. The Employee stated that Mr Edmund told her that her relationship with the staff had reached a level where it could not continue and rather than being dismissed and having a blot on her record he thought she should resign and that she would get

her full Severance Pay and all the monies due to her, which he calculated and said was \$ 49,438.75. Mr Edmund then asked the Employee what she had to say but before she replied he said, "If I were you I would take the money and run."

[6] The Employee added that Mr Edmund then told her that her services were no longer required. She said that she then asked Mr Edmund if he meant she was fired and he said "yes, immediately." She then stretched out her right hand and said to him, "my money, I am waiting to receive my cheque." Mr Edmund then said to her that he would have to prepare her cheque and that he would send it to her – it was too late in the afternoon to prepare the cheque. The Employee said that she told Mr Edmund she would not be coming back to the premises.

[7] On June 1, 2000, a cheque for her Severance was sent to the Employee together with a resignation letter drafted by Mr Edmund for signature. The Employee refused to sign the letter and kept the cheque and Mr Edmund telephoned her twice about the matter. On June 15, 2000, Mr Edmund wrote to the Employee requesting return of the cheque and the resignation letter. Prior to the meeting of May 30, 2000, Mr Edmund had received several complaints about the poor quality of the work from the Department and written letters to the Employee requesting improvements and for a period there was some improvement but afterwards the position again deteriorated – in some instances some of the staff were not speaking to the Employee, their Supervisor and the Supervisor was not speaking to certain members of her staff. He held meetings with the Employee on January 12, 2000, and again on February 12, 2000, but the unsatisfactory conditions continued. On June 8, 2000, when Mr Edmund called the Employee about the cheque and the letter, she refused to sign the resignation letter or return the cheque which she deposited to her account at her bank.

- [8] Arthur Edmund gave a different account of what happened from that given by the Employee. Mr Edmund denied that the Employee was ever dismissed and contended that she was severed by consent. The witness said that at first the Employee and himself had a good working relationship but after a time there were complaints from Guests, Home Owners, Board Members and Staff about the quality of the work being performed by the Department; the staff also expressed dissatisfaction with the Employee's leadership and said that she failed to motivate them and was not performing her work properly. Over the years he spoke to the Employee about the issues but there was no improvement and in fact matters worsened – the matters were brought to her attention at meetings with other Supervisors, at Supervisors Meetings and General Meetings – there was also motivational training from outside personnel, in particular, Miss Shirlene Nibbs, the Director of Tourism.
- [9] At one stage the staff of the Department was split down the middle with one faction not speaking to the other or to the Supervisor and the Employee was not able to resolve the situation. Matters reached a point where the Employee had to report to him on the situation every day but after a while this fizzled out and all fell apart again.
- [10] At a meeting on February 10, 2000, at which the Chairman of the company, the Secretary and Donni Dowe, were all present, the Employee said that the Supervisors did not accept her, that it was impossible to work with them and that she may have to resign and asked to be "paid off" or sent to work under someone else.
- [11] At the meeting on May 30, 2000, Mr Edmund said that he told the Employee that something had to be done about the problem and gave her two options, viz, Severance or resignation and in the latter instance

he would see if he could get the Board to pay her off without any loss of severance. The Employee accepted the option to resign without sully her record. Before going to the meeting Mr Dowe and Mr Edmund had done a rough calculation and they told the Employee the amount of her entitlement in a package. Mr Edmund also told the Employee that he was glad she had accepted the package and so he will not have to put anything on her file. Mr Edmund further added that he had sufficient grounds on which to dismiss the Employee but did not want to do so as she would not then receive any compensation and would lose her years of service (Severance) and entitlements.

Triable Issues

[12] The issues here for determination seem to be:

- (a) Was the Employee dismissed or did she resign from her position and, if so, were any threats or coercion used to persuade her to resign. Further, if she resigned was she at liberty to have her job back, or did she ever request her job back?
- (b) Was the Employee dismissed and, as such, entitled to compensation for Unfair Dismissal?
- (c) Could the money paid to the Employee as Severance in fact be deemed damages for Unfair Dismissal and is she entitled to further monies under the additional Heads?

The Arguments

[13] Mr Kentish, on behalf of the Employers, denied that the Employee was dismissed or unfairly dismissed, was coerced into an agreement to resign or to resign or that the Employers terminated the contract by inveigling the Employee to resign:

- (a) On or about May 30, 2000, the Employee was confronted by Management about the serious and prolonged deficiencies in her department. She acknowledged these deficiencies and it was there mutually and freely agreed that the Employee would voluntarily resign her employment and in due course receive compensation in the form of Severance Pay for her years of service.
- (b) At the meeting of May 30, 2000, between the Employee, Arthur Edmund and Donni Dowe, the two gentlemen did not have any specific instructions to terminate the Employee's services although they were required to do something about the problems in the housekeeping department.
- (c) There was a free exchange between the parties present at the meeting. The several complaints and deficiencies of her department were pointed out to the Employee and her inability to effectively identify and rectify the problems.
- (d) The Employee presented the Court with a different version of what took place at the meeting of May 30, 2000 and the Court, as of necessity, is called upon to determine the creditworthiness of the parties.
- (e) If the Employers had intended to take advantage of the Employee would they have offered her Severance (Gratuity)?
- (f) The witnesses for the Employers gave their evidence in a straightforward manner and their version of the events is the more credible.
- (g) The Employers believed they had enough grounds to terminate the Employee's employment but they offered her the opportunity to resign with the accrued gratuity equity in hand so as to avoid sullyng her file.
- (h) The Employee failed to live up to the expectations of management.

- (i) The letters of January 12, 2000, February 21, 2000 & February 22, 2000, were warning letters.
- (j) Should the Court find that there was an Unfair Dismissal the monies paid to the Employee should be taken into account and applied by way of credit to the Employers but the Employee would not be entitled to any award for Manner of Dismissal, Immediate Loss or Future Loss and that she has already received her Vacation Pay.

[14] Mr John did not share the views of Mr Kentish and contended that, inter alia:

- (a) The Employee's services were terminated by Mr Edmund on May 30, 2000, and the Employers failed to satisfy the requirements of Section C.59(3) of the Antigua and Barbuda Labour Code/the Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, in that if the Employee was no longer performing her duties in a satisfactory manner they did not give her a written warning describing the unsatisfactory employment in respect of which the written warning was given and the action the Employers intended to take in the event of repetition. Also, that the Employers have not shown that the Employee, within the period of three months following the receipt of the written warning failed to demonstrate that she is able to perform or has performed her duties in a satisfactory manner. Also, that the Employee was not responsible for the problems in the department, there was no performance appraisal system in place to objectively assess the Employee's performance and she was made a scapegoat after eighteen years of satisfactory service. In addition, as at May 30, 2000, the three months warning period in respect of the letter of February 29, 2000, had expired and that none of the letters specifically stated that the Employee's services would be

terminated if there were any further unsatisfactory performance during the next three months.

- (b) The Employee did not resign when attending the meeting of May 30, 2000, or at all nor did she ever agree to resign. The Employers have failed to show what words used by the Employee amounted to an agreement to resign – the Employee's resignation must be expressed in words which are unequivocal. Also, the Employee must have sufficient time to contemplate any decision to resign.
- (c) The Employee had acted in the heat of the moment and this made any purported resignation void.
- (d) Alternatively, the Employee was forced to resign under the threat of dismissal for failure to perform her duties in a satisfactory manner.
- (e) The Employers terminated the employment by persuading (inveigling) the Employee to resign.
- (f) The monies paid to the Employee were, in fact, her Basic Award (P8).
- (g) The Employee is entitled to Compensation for Manner of Dismissal, Immediate Loss and Future Loss.

[15] In support of his contentions Mr John cited the following cases:

- (i) Kwik-Fit (G.B.) Limited V Lineham (1991) E.A.T. 183.
- (ii) Caledonian Minign Co. Limited (1987) ICR425
- (iii) Sheffield V Oxford Controls Co. Limited (1979) EAT396
- (iv) Martin V Glynwed Distribution Limited (1983) ICR511 (CA)
- (v) Universal Caribbean Establishments Limited V Harrison (1997) 56WIR242

The Law

[16] The Law relating to Unfair Dismissal is set out in the Antigua and Barbuda Labour Code, Cap. 27, Laws of Antigua and Barbuda, Revised Edition, 1992, and Section C.56 grants an employee the right not to be unfairly dismissed; the Section also prohibits an employer from dismissing an employee without just cause.

[17] Section C.58(1) sets out the instances when a dismissal will not be unfair, viz:

- (a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
- (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C.59 (5);
- (c) is that the employee was made redundant;
- (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; 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.

[18] Section C.58(2) of the Act lays down the test to be applied in deciding whether or not a dismissal was unfair and provides that it is whether or not, under the circumstances, the employer acted unreasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which

existed, if known to the employer, would have reasonably led to the employee's dismissal.

[19] Section C.59 (1) deals with the issue of misconduct and provides that: "An Employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes but is not limited to situations in which the employee has:

- (a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue.
- (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer, or
- (c) behaved immorally in the course of his duties."

[20] Section C.59(2) deals with written warnings in lieu of dismissal and provides thus: "Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of:

- (a) a repetition of the misconduct, or
 - (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.
- (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

- (4) Where within six (6) months of the receipt of the written warning under subsection (2) the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning.
- (5) Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the written warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee.”

The Decision

[21] Mr John asked the Court to find for the Employee and to find, on the one hand, that her services were terminated by Mr Edmund at the meeting of May 30, 2000, or alternatively, if the Court were to find that the Employee had agreed to resign, she had done so after being threatened and put in fear of termination. Also, that the Employee had acted in haste and anger and did not have an opportunity to fully consider and assess the surrounding circumstances.

[22] As Head of the Housekeeping Department it was the responsibility of the Employee to ensure that the Department operated satisfactorily and the evidence is that this was far from the case. The chief source of the unsatisfactory performance of the department was due to the strained

relationship between the Employee and two members of her staff resulting in the disharmony and lack of performance caused by the split that developed.

- [23] Both Mr Edmund and Mr Dowe testified that the Employee was never issued a termination, whether in writing or orally. Mr Edmund said as follows of the encounter, "I told her (the Employee) the problems were still there and I wanted to know what we were going to do about them. I gave her some options and said to her, 'we have to do something about this problem.' I am willing to assist you by asking the Board to sever you or you will be terminated and get nothing. If you resign and I am able to get the Board to agree to pay you off and not leave any smear on your file. Before this meeting she had suggested being paid off so when this option was given to her she said, "One has got to do what one has to do." She then agreed that she would accept. She then asked me about how much she would get as Severance and I told her. Before going to the meeting Mr Dowe and myself had done a rough calculation and arrived at a figure and so we told her. At that point she questioned some aspects of the package, I think it was vacations – we offered her a package. We subsequently corrected it. I then told her I was glad she had accepted the package so that I would not have to put anything on her file. She said "yes". She then said, "Can I have everything now as I do not wish to come back to the hotel." It was about 4:00pm and I told her it was not possible for her to get the money at the time so I suggested to her that I would send the letter and the cheque with the driver the following morning. I did so. The driver was instructed to deliver the cheque and the letter of resignation for signature but nothing came back. A few days later I called her to find out when I would get back the letter and she told me she was not ready to sign as yet. I called her on another occasion and she told me she had been advised otherwise.

- [24] "I may have told her if I were her I would take it and run as I had enough to terminate her. I never expected this matter to have reached so far."
- [25] During his Cross-Examination, Mr Edmund further said, "I told her we have to do something to solve the problem and she said she would like to be paid off. I suggested Severance to her and she accepted."
- [26] "Severance Pay was an option and so we had calculated her Severance Pay. Other options were termination or for her to resign. She was the one who agreed to accept Severance. Severance was suggested to her and she agreed. She also agreed to resign and to sign the resignation letter. I told her I would send the Severance cheque to her with the letter of Resignation."
- [27] "She was not in an emotional state at the meeting. She voluntarily resigned and left work that very afternoon never to return to the premises. She did not want to put her foot on the premises again and so I sent her cheque to her."
- [28] The Employee's account of what happened has already been mentioned but it is to be noted that she did, however, admit that despite the training and meetings, the staff was divided, she did not have their full support, the performance was below par and there were several problems, she asked Mr Edmund to pay her the amount of the Severance, he offered her resignation and that she wanted to be paid then and there as she was not coming back to the hotel.
- [29] I find it difficult to imagine that Mr Edmund whom I saw as he gave his evidence and whose demeanour I closely monitored, would have invented his version of the facts in order to mislead the Court. Mr Dowe

was present throughout the meeting of May 30, 2000, and supports his testimony.

[30] With regard to the issue of the alleged resignation, although the Employee maintains that she never agreed to resign and did not resign, here again she is not able to support her theory with any independent or other testimony.

[31] Although I have not been able to find any provision in the Labour Code to the effect that if a person resigns or agrees to accept termination of his employment in a moment of anger or other form of emotional disturbance and within a reasonable time thereafter returns to continue his employment the Employer, is obliged to withdraw the termination/resignation and permit him to continue his employment without any losses whatever or he will be liable for Unfair Dismissal. Mr John strongly contended that this certainly was the state of the Law in the United Kingdom as was held in the Kwik-FTT case and the Martin case and is also the position in Antigua and Barbuda.

[32] But to be successful on a claim that the Employee was coerced into resignation it has to be shown that Mr Edmund used threats of dismissal, intimidated the Employee into an agreement to resign and the resignation was not unambiguous. Also, that the Employee requested the continuation of her job, resigned in the heat of the moment, did not have an opportunity to consider the matter, that the Employer had dishonestly persuaded the Employee to resign and that the contract of employment was terminated by the Employers who dismissed the Employee – See Calodonian Miners Case; that Counsel is now suggesting that the Employee agreed to resign, though under pressure, and not that she was terminated, his prior contention.

[33] In order that re-instatement should obtain where an employee resigns and then asks for re-instatement without any loss of benefits or position, the cases suggest that the request should be made within a reasonable time and that is dependent upon the surrounding circumstances and in the present case the Employee never asked for her job back, never returned to the workplace and the Employer had to contact her 8 days later re the cheque and the resignation letter and it was but 15 days thereafter when she informed the Employer that she had taken legal advice and was reconsidering the matter.

[34] And, of course, the Employee kept the Severance Pay delivered to her on June 1, 2000, deposited it to her account at her bank and never returned it or any part thereof – and she never returned to the premises. Further, the Employee never communicated with the Employers for 14 days or return to her post and, to my mind, she thereby abandoned her job.

Conclusion

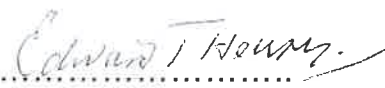
[35] This is a rather unfortunate case in that the Employee, after 18/19 years of service and at age 58 should find herself out of a job and without pension rights bearing in mind that the normal retirement age in the position is 60 years. I have carefully considered the provisions of the Labour Code pertinent to the issues raised and, in particular, Section 10(3) and endeavoured to arrive at a decision that is fair, just, equitable and in the best interests of good industrial relations and the community at large and, at the end of the day, I would accept the testimony of Mr Edmund and do not find that the Employee was Terminated or

Unlawfully dismissed. The Reference is hereby dismissed. There will be no Order as to Costs.

DATED the day of , 2004

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Cyril L. Maundy
President

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Edward T. Henry
Member

I concur

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Genevieve Benjamin
Member