

ANTIGUA & BARBUDA

Original

IN THE INDUSTRIAL COURT

REFERENCE NO: 1 of 2005

BETWEEN:

CATHERINE ANTONIO – Employee

and

ROYAL ANTIGUAN NATIONAL RESORT LIMITED - Employer

Before:

The Hon. M. Althea Crick

Chairperson

The Hon. Genevieve Benjamin

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Mr. George C. Lake of Lake & Kentish for the Employee

Ms. Stacy A. Richards of Richards and Company for the Employer

2009: April 6

2011: March 10

JUDGMENT

Recall outside three month period after temporary termination – Selection for temporary termination unfair and unreasonable

- [1] By Reference filed on January 14, 2005, Mr. George Lake of Lake and Kentish, acting for the Employee, notified the Court of a trade dispute between the Employee and the Employer. By Memorandum filed on the same date, the Employee submitted that the Employer failed to recall the Employee, whose services were temporarily terminated, within the prescribed three month period after the termination. The Employee further submitted that the Employer's failure resulted in a permanent termination of her services. Alternatively, the Employee contended that, in any event,

she was unfairly and unreasonably selected for temporary termination.

- [2] The Employer (**the Hotel**), filed its Memorandum on April 24, 2006. In it the Employer stated that while the Employer, at the time of the filing of the Employee's Memorandum, conducted a hotel business at Deep Bay, St. John's, Antigua, that business no longer existed at the time of the filing of the Employer's Memorandum. The Employer further contended that the recall date was not later than three months after the date of the Employee's temporary termination.
- [3] The Employee gave evidence on her own behalf and called no witnesses. The Employer called no witnesses.

HISTORICAL BACKGROUND

- [4] The Employee, Catherine Antonio, was employed at Royal Antiguan National Resort Ltd. during 1994. The actual date of commencement of employment was not placed in evidence.
- [5] Some time in October 2002, Ms. Pauline Horten was made Rooms Division Manager. In that same month the Employee was called to a meeting. The General Manager Mr. Vernon Jeffers, Ms Horten, Mr. Anderson Carty and Ms. Antonio were present. At this meeting the Employee was informed that one Ms. Tully was employed as her assistant. At that time she held the position of Executive Housekeeper.
- [6] On or about March 7, 2003, the Employee observed a notice on the staff bulletin board. It indicated that although the Hotel was experiencing higher occupancy levels, the "world economic crisis and war" indicated that tougher times were imminent. It further stated that operational changes would be made in an effort to streamline operations and cut costs. These changes could include a shortened work week, rotation of staff and temporary termination.

- [7] By letter dated April 29, 2003, the Employee was notified that she was selected for temporary termination effective May 6, 2003. There was no recall date.
- [8] During the period that the Employee was temporarily terminated, the Hotel occupancy rate averaged seventy-five percent. She was the only manager who was laid off. Her assistant, who had been employed for about six months at the time, was not temporarily terminated. The Hotel's guide for housekeeping stated that a Housekeeping Manager and assistant are required when the Hotel has an occupancy rate of twenty-five percent or higher.
- [9] By letter dated July 2, 2003, the Employee proposed a voluntary separation to the Employer. The Employer responded by letter dated July 29, 2003, declining the proposal.
- [10] By letter dated July 31, 2003 and received by the Employee in the first week of August 2003, the Employer recalled the Employee to work from August 6, 2003.
- [11] On August 6, 2003, the Employee wrote to the Employer stating that since the recall date was not within the three month period after the temporary termination, she had been constructively dismissed and was therefore entitled to a severance package.
- [12] The Employee claimed that as a result of the Employer's action she was without work for four months. She was unfairly and unreasonably selected for temporary termination and the actions towards her were against good labour standards, were discriminatory towards her, were contrary to law and the Employer's own established industrial practice.
- [13] The Employer, in response to the Employee's Memorandum, claimed that the company named in the Reference was not the Employer; that the Employee was recalled within the three month period prescribed by the

Antigua and Barbuda Labour Code (the Code) and that the date for the Employee's return to work was extended when she did not report to work on August 6, 2003 as requested in her letter of recall dated July 31, 2003.

PRELIMINARY MATTERS

- [14] At the commencement of the hearing, the Employer stated that,
- I. the company named as the Employer in the Reference was not affiliated with the entity trading as Royal Antiguan Resort and hence the name of the employer company was incorrect
 - II. in any event, the company was sold; it is not trading, it has no assets and no employees
 - III. a claim against the company would therefore be futile.

THE EMPLOYEE'S CASE

- [15] The Employee gave evidence. She stated that she resides at Browne's Avenue, St. John's. The signature to a Supplemental Witness Statement which was filed on her behalf on July 31, 2008 is hers. The contents are true and correct. She explained that the date August 29, 2003 stated in paragraph 8 of the Statement should read April 29, 2003.

- [16] There was no cross examination by the Employer.

THE EMPLOYER'S CASE

- [17] The Employer presented no witnesses.

RELEVANT ISSUES

[18] The substantive issues are as follows:

- i) Was the Employee recalled to work in keeping with Section C42 (1) and (2) of the Antigua and Barbuda Labour Code?
- ii) If the answer to i) above is no, what is the measure of damages, if any, which should be paid to the Employee?
- iii) If the answer to i) is yes, did the Employer act reasonably in dismissing the Employee when she failed to report to work?
- iv) Was the Employee unfairly selected for temporary termination?
- v) If the answer to (iv) above is yes, what is the measure of damages, if any, which should be paid to the Employee?

THE EMPLOYEE'S SUBMISSIONS

- [19] In his submission, Counsel for the Employee contends that the Employer was in violation of Section 42 (1) and (2) of the Antigua and Barbuda Labour Code since the Employee was placed on temporary termination on May 6, 2003 and was asked to report to work on August 6, 2003.
- [20] Making reference to the **Interpretation Act Cap 244, Section 8 (c)** and the **House of Lords decision of Dobbs v Walker [1981] 2 All ER 609 to 610**, Counsel argued that reference to a month in a statute is understood to mean a calendar month. A month starts on the first and ends on the last day of that month. Consequently the three month period ended on August 5, 2003. Since the Employer did not recall the Employee to report to work until August 6, 2003 the three month period required by law was not met.

The Employee was therefore severed and entitled to compensation. Additionally, the Employee, as a result of the temporary termination, was without work for four months after the three month period.

- [21] As a further submission, Counsel argued that alternatively, the Employee was unfairly and unreasonably selected for temporary termination. The Employer's own policy stated that a Housekeeping Manager and Assistant had to work forty hours per week if the hotel occupancy rate was twenty-five percent and higher. The occupancy rate at the time of the temporary termination was seventy-five percent. Junior workers, persons who had less seniority than the Employee, were not laid off. It is Counsel's submission that the Employee is therefore entitled to compensation for immediate loss of earnings from the date of dismissal, loss of future earnings, loss for manner of dismissal, costs and any other relief the Court considers just.
- [22] Additionally, the Employee contends, the Employer presented no evidence at the hearing. Since the Employer's Memorandum is but pleadings, there is no evidence before the Court to refute the claims of the Employee.

THE EMPLOYER'S SUBMISSIONS

- [23] Counsel for the Employer argued that the Employee's date of recall was within the three month period required by Section C42 (2) (b) of the Antigua and Barbuda Labour Code. The Employee received a letter of recall dated July 31, 2003 well within the three month period. August 6, 2003, the date the Employee was required to report to work, is not the date the Employee was recalled.
- [24] The Employer submitted that if it was found that the Employee was not recalled within the time frame stipulated by the Labour Code, she is entitled to severance pay only as prescribed in Section 41 of the Code.

- [25] It was also submitted that the Court should not consider the Employee's pleading that she was unfairly selected for temporary termination and was therefore constructively dismissed. The Employer submitted that the Employee accepted that she had been correctly temporarily terminated and in fact requested by letter to the Employer dated July 2, 2003 that the Employer consider granting her a voluntary separation package. At no time was the question of unfair selection for temporary termination raised by the Employee.
- [26] Additionally, the Employer contends that in the event that the Court finds that the Employee was unfairly selected for temporary termination, no award should be granted for immediate or future loss. The Employee produced no evidence to give the Court room to make an award for future loss, no evidence of efforts to mitigate loss by providing proof of attempts to find alternative employment.

ISSUE NO. 1

Was the Employee recalled to work in keeping with Section C42 (1) and (2) of the Antigua and Barbuda Labour Code?

THE LAW

- [27] Section C 42 (1) and (2) of the Antigua and Barbuda Labour Code states as follows:

“(1) Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C40, the employer shall remit to that employee severance pay computed in accordance with section C41.

(2) If the termination be stated as temporary, no severance pay need be remitted to the terminated employee at the time of termination:

Provided however that-

(a).....

(b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled:

in which case, interest at the rate of ten per cent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.”

- [28] Both the Employer and Employee centred their arguments in respect of August 6, 2003, the date on which the Employee was required to report for work, rather than the Employer’s letter of recall dated July 31, 2003. Each used the same case, **Dobbs v Walker**, (op cit) to support his/her argument. Upon a close examination of Section 42, however, it is clear that the three month time limit contained in the section is in relation to the “date of recall” of the employee to work and not the commencement of work. We conclude therefore, that the Employer’s letter of recall dated July 31, 2003 was well within the three month timeframe set by the law for a recall, after the temporary termination which occurred on May 6, 2003.

ISSUE NO. 2

If the answer to Issue 1 above is no, what is the measure of damages, if any, which should be paid to the Employee?

- [29] This issue is not applicable given the conclusion reached at paragraph [j28] above.

Provided however that-

(a).....

(b) if no date of recall is given at the time of termination, severance pay shall be payable when and if, after three months from the termination, the employee shall not have been recalled:

in which case, interest at the rate of ten per cent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.”

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ISSUE NO. 2

If the answer to Issue 1 above is no, what is the measure of damages, if any, which should be paid to the Employee?

[29] This issue is not applicable given the conclusion reached at paragraph [j28] above.

ISSUE NO. 3

If the answer to Issue 1 is yes, did the Employer act reasonably in dismissing the Employee when she failed to report to work?

- [30] By letter dated April 29, 2003, the Employer notified the Employee that she would be temporarily terminated effective May 6, 2003. By letter dated July 2, 2005 the Employee wrote to the Employer proposing a voluntary separation package. The Employer responded thus:

July 29, 2003

*Mr. Charlesworth O.D. Browne
Attorney-at-Law,
Lake & Kentish Chambers
Nevis Street,
P.O. Box 512
St. John's*

WITHOUT PREJUDICE

Dear Sir,

Re: Catherine Antonio – Temporary Termination

I act for and on behalf of the Royal Antiguan National Resort Ltd. in reference to the employee named.

Further to telephone discussions on the issue cited, we wish to officially respond, in writing, to your letter of July 2nd instance addressed to the General Manager, which made representation on behalf of Ms. Catherine Antonio, our Executive Housekeeper.

While it is that we do have an appreciation for the position put forward, particularly as it relates to the noted socio-economic circumstances of the employee, Management of the Resort would not consider this proposition a preferred alternative given the employee's value to the Company and our intention to bring her back not later than August 6, 2003.

I trust that you will understand our position at this time.

*Sincerely,
ROYAL ANTIGUAN NATIONAL RESORT*

*.....
Signed
Anderson E. Carty
Corporate Industrial Relations Officer*

*cc: Vernon Jeffers
Alex de Brito*

[31] The Employer again wrote to the Employee:

July 31, 2003

*Ms. Catherine Antonio
Browne's Avenue
St. John's,
Antigua*

Dear Ms. Antonio,

Further to our letter dated April 29, 2003, effecting temporary termination of your employment on May 6th instance, we are pleased to notify you of your recall to work from August 6th, 2003.

Please contact your department head, Ms. Horton, before the above date to give confirmation of your return and to be advised of your time for reporting.

We encourage and look forward to your usual support on your return to duty.

Sincerely,

ROYAL ANTIGUAN NATIONAL RESORT

.....
Signed

Vernon Jeffers

General Manager

cc: Glen Young

Ms. Horton

Mr. Charlesworth O.D. Browne

[32] By letter dated August 28, 2005, the Employer wrote the following to the Employee:

August 28th, 2003

*Ms. Catherine Antonio
Martin's Village
St. John's*

WITHOUT PREJUDICE

Dear Ms. Antonio,

By letter dated July 31st, 2003, you were recalled to work following temporary termination which was effected on May 6th, 2003, until further notice. On August 6th instance, your legal representative replied on your behalf making severance claim on the ground that the "date of recall (was) is after three months from the termination".

Suffice it to say, because we were at serious variance with your representative's interpretation of the relevant section of law dealing with temporary termination and recall, we allowed for a period of mutual dialogue in the continuing interest of good industrial relations.

Consequently and without prejudice to the fact that you did not report for duty as per our initial letter of recall, we make a conscientious decision to extend the courtesy of a "new" recall date albeit that you did not return up to (5) days later.

Unfortunately, at this stage, given the present demands of business and your pursuance of severance rights claim, we have formed the reasonable opinion that it is not your intention to return to your substantive duty at the Hotel and further that this action, on your part clearly constitutes job abandonment. Therefore, we have no other reasonable alternative but to accept your constructive resignation with effect from August 27th, 2003, and to wish you good luck with your future career.

Sincerely,

ROYAL ANTIGUAN NATIONAL RESORT

.....
Signed:

Vernon A. Jeffers, Sr.

General Manager

*cc: Glen Young
Lake & Kentish
Alex de Brito
Bryan O'Neil
Anderson Carty
Rob Barrett*

- [33] The Court has concluded that the Employer's date of recall fell within the three month timeframe required by Section 42 of the Code. The onus was on the Employee to report to work in response to the Employer's recall. A letter from the Employee's attorney-at-law to the Employer, dated August 6, 2003, the date on which she was due to report to work, clearly indicated that she had no intention of reporting to work. That letter reads as follows:

*Mr. Vernon Jeffers,
General Manager,
Royal Antigua Resort,
P.O. Box 1322
St. John's
ANTIGUA*

Dear Sir,

Re: Catherine Antonio

We refer to your letter dated July 31st, 2003, to our client and note that the date of her recall is after three months from the termination.

In the circumstances, our client is entitled to severance pay with interest, one month's notice pay and payment in lieu of vacation. Our computations are as follows:-

<i>Severance 9 years @ \$5,500.00 per year</i>	<i>\$49,500.00</i>
<i>Notice pay -</i>	<i>5,500.00</i>
<i>Vacation – 42 days @ \$253.85</i>	<i>10,661.54</i>
<i>Interest on Severance as at 06/8/03</i>	<i>1,237.50</i>
<i>Total -</i>	<i><u>\$66,899.04</u></i>

We look forward to receiving your cheque as soon as possible. If we do not hear from you by 15th August, 2003, we will take further steps to advance our client's claim.

Yours faithfully,

*Signed:
LAKE & KENTISH
Attorneys-at-Law*

Catherine Antonio

- [34] The Employee was of the mistaken belief that the date of recall was August 6, 2003 rather than July 31, 2003. This explains her failure to report to work on August 6th, 2003 as requested by the Employer and the letter written by her legal representative to the Employer. It is worthy of note that the Employer considered the Employee in its employ up to August 26th, 2003. Given the contents of her letter of August 6, 2003, and the twenty days which had passed, the Employer reasonably concluded that she had no intention of reporting to work.

ISSUE NO. 4

Was the Employee unfairly selected for temporary termination?

- [35] The Employee contends, inter alia, that

a) she was the only manager who was laid off;

b) shortly before her being temporarily terminated some employees who had been laid off were recalled, on her recommendation, because of the hotel's high occupancy rate;

c) her assistant who had been employed in October 2002 was not laid off;

d) the hotel violated its own Managing Guide for Housekeeping which states that a Housekeeping Manager and assistant must work forty hours per week when the hotel's occupancy rate is 25% or greater. The rate at the time of her temporary termination averaged 75%.

[36] The Employer called no witnesses. The Court therefore looked to the letter of temporary termination written to the Employee in addressing this issue. The Employer in this letter states, inter alia, as follows:

“As you are aware, our memo of March 7th disclosed the possibility of several austerity measures being implemented in view of current and predicted economic circumstances including those being triggered by the ongoing war climate. In addition, our best efforts to continue to promote the Hotel through our wholesalers is being severely hampered by the Government's undertaking to sell the property, which is aggressively being marketed via the internet.

This latter action mainly accounts for a drastic falloff in business, which is creating serious difficulty in us being able to meet weekly payroll and other related costs. In fact, most of you would be aware of numerous cost control measures that we have introduced, over the period, in an attempt to absorb current losses and keep the Hotel in operation.

Since our memo, we have introduced a shortened work week in all departments and some rotation is also currently taking place. Unfortunately,

however, these measures have not, altogether, brought about the relief required at this time, to stabilize the finances of the operation. Therefore we are forced to introduce some layoffs in all departments. This action regrettably, will affect some managers as well as staff(s).”

- [37] The Court is faced with a difficulty. While the letter outlines the reasons for the need for temporary termination, it does not indicate the method used in determining who should be terminated. The Employee, on the other hand, suggests that a “last in first out” method would have resulted in someone, other than herself – possibly her recently employed assistant – being laid off from that department and suggests further that, given the Hotel’s high occupancy rate and its own Management Guide for Housekeeping, no one from the housekeeping department should have been temporarily terminated.
- [38] The fairness of the Employee’s selection is essentially always a question of fact to decide whether or not the Employer acted reasonably. This is contained at Section C58 (2) of the Labour Code. Each case must be decided on its own facts.
- [39] The circumstances proffered by the Employee why the Employer unfairly selected her are outlined at paragraph 35 above. One of the major arguments put forward related to the Employer’s failure to follow its Managing Guide for Housekeeping.
- [40] This Guide is simply what it states, a guide for the assistance of the Hotel to make a determination in certain circumstances. The occupancy level at the date of her temporary termination was 75%.
- [41] (i) A failure of the Hotel to depart from its Guide does not lead inexorably to the conclusion that the Employee’s selection was unfair. I derive some

assistance in this regard from the reasoning in **Bailey v BP Oil Kent Refinery Ltd. [1980] IRLR 287 (CA)**.

(ii) In this case Mr. Bailey was dismissed after it was discovered that he had abused the company's self-certification short term sickness absence by stating that he was sick when in fact he had been seen elsewhere on holiday. An Industrial Tribunal held that his decision was fair.

(ii) The Employment Appeal Tribunal (EAT) held that the dismissal was unfair. The reasoning of the EAT was that as the company failed to follow the disciplinary procedure before dismissal, his dismissal was unfair. The company appealed to the Court of Appeal.

[42] The Court of Appeal allowed the company's appeal and substituted a finding of fair dismissal. Lord Justice Lawton wrote the judgment of the Court. The head note at page 287 of the judgment reads inter alia as follows:

"The employers' failure to comply with the agreed procedure is a factor to be taken into account; but the weight to be given to it depends on the circumstances. An Industrial Tribunal should not base its decision on reasoning to the effect that because there has been a failure to comply with the procedure, the dismissal must have been unfair. The relevant statutory provisions contain no reference to procedures with trade unions".

[43] So the Court is required to consider the other circumstances referred to at paragraphs 35 and 36 above. In deciding what action it should take and which employee it should temporarily terminate, the Hotel took into account a number of factors. These included those referred to at paragraph 35 above and those mentioned in paragraph 36 above.

[44] Such factors included (a) that the Employee was the only manager who was laid off (b) some employees who had been laid off were recalled, (c) her assistant was not laid off, (d) the current and predicted economic circumstances, (e) the Government's undertaking to sell the property which was aggressively marketed, (f) the Hotel's challenge to pay its staff and related costs, (g) a shortened work week for some staff, (h) a notice that such measures may affect some managers.

[45] No employee was to be exempt from the Hotel's measures as it was being faced with the difficulties and choices outlined at paragraphs [35] and [36] above. In all of the circumstances of this case there is no reason why I should conclude that the Employer's actions to select the Employee were unfair.

ISSUE NO. 5

If the answer to Issue 4 above is yes, what is the measure of damages, if any, which should be paid to the Employee?

[46] There is no reason to consider this issue given my findings at paragraph [45] above.

CONCLUSION

[47] We considered a number of factors in arriving at our conclusion. These included the demeanour of the witness and the arguments presented by both sides. We sought to act in accordance with equity, good conscience and the substantial merits of the case. We had regard to the principles and practices of good industrial relations and particularly, the Antigua and Barbuda Labour Code, in arriving at a decision which is fair and just. We

also had regard to the interests of the persons immediately concerned and the community as a whole.

[48] We have found that the temporary termination of the Employee was well grounded in accordance with Section 42 of the Antigua and Barbuda Labour Code. In addition the Employer was reasonable in concluding that the Employee did not intend to report for work on the date indicated in the letter of recall. I also hold the Employee was not unfairly selected for temporary termination.

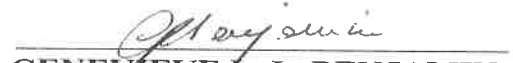
[49] The Employee's Reference is dismissed. There shall be no order as to costs.

Dated the 10th day of March, 2011



M. ALTHEA CRICK
Chairperson

I agree


GENEVIEVE L. I. BENJAMIN
Member

I also agree


Dr. HAYDEN THOMAS
Member