

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 28 of 2005

BETWEEN:

BARRYMORE GORDON

First Employee

MENELVA SAMUEL

Second Employee

and

HALCYCON COVE by rex resorts

Employer

Before:

The Hon. Philip A. Pilgrim
The Hon. Samuel Aymer
The Hon. Oscar Frederick

President
Member
Member

Appearances:

Mr. Egbert Joseph of Hotel Management Association for the
Employees

Ms. Veronica Thomas of Richards & Company –
Attorneys-at-Law for the Employer.

2008: June 04

2008: November 25

JUDGMENT

Some essential facts

PILGRIM P.:

- [1] At the outset of the hearing, Ms. Veronica Thomas Attorney-at Law for the Employer made an application to change the name of the Employer from that of Rex Halcyon Cove Hotel to that of **HALCYON COVE by Rex Resorts**. Mr. Egbert Joseph did not object. The Court with the consent of

both parties ordered that the Employer's name in this reference be changed to HALYCON COVE by rex resorts.

[2] Antigua & Barbuda earns a great amount of money in foreign exchange from the tourist industry. It is a beautiful country. Many hotels cater to tourists and locals alike. One of them is **HALCYON COVE by rex resorts**. It is located at Dickenson Bay in the parish of St. John's.

[3] It was there that both of the Employees have worked for many years. They have been able to support themselves and their families. Both of them enjoyed their working experiences with the Employer. The relationship between the Employees and the Employer came to an end. This was due to what the Employer regards as a severance of the employees. Whether or not this is so, is the essential subject of this judgment.

The case of Ms. Menelva Samuel

[4] Ms. Samuel resides at Bellevue Estate in St. George's Parish in Antigua. She is 58 years of age. She commenced her employment with the Employer on July 28, 1980. She started as a cashier. During the intervening years she obtained some promotions. Her position on October 3, 2005 was that of Head Housekeeper.

[5] In her capacity as Head Housekeeper her monthly salary was \$5,000.00. No evidence was led by either party to state whether or not this represents net or gross.

- [6] As Head Housekeeper her duties entailed being responsible for the management of the housekeeping and laundry departments. She was in charge of about 50 employees. Her immediate superior was the General Manager of the hotel Mr. James Prosper.

The meeting of July 13, 2005

- [7] Ms. Samuel recalls a meeting which took place on July 13, 2005. This was a Heads of Department meeting. She attended as a Departmental Head. Mr. Prosper attended the meeting. It is Ms. Samuel's testimony that Mr. Prosper informed the meeting that the hotel would be closed in order to facilitate renovations being done to it. According to her, Mr. Prosper stated that the period of closure would be between six weeks to two months.
- [8] In answer to Ms. Thomas however, she stated that "*the hotel was in a terrible condition.*" She knew this because "*she was in those rooms on a daily basis. Certain areas were in serious disrepair, including the plumbing and air conditioning for certain sections of the rooms.*" The hotel consisted of 216 rooms. In her opinion 78 of them were in a terrible condition. She described the work to be done as "*minor renovations*".
- [9] In her opinion however "*the hotel required major refurbishment..... the plumbing was giving brown water. This required quite a bit to get the problem solved. Many of the bathtubs required to be changed, they were rusting as well as the majority of the air conditioning.*" According to her Mr. Prosper informed her that the storeroom was required to be relocated from its original position to another location. This was near to the kitchen. Mr. Prosper also informed her that the roof which housed the time share section was "*termite eaten*".

- [10] Still under cross examination, Ms. Samuel informed the Court of other observations which Mr. Prosper expressed to her. These included (a) a test done by the hotel to ascertain whether or not its foundation was strong enough to accommodate an upper floor; (b) repairs to the roof of the time-share section; (c) the repairs would take between 6 weeks to 2 months; (d) during the repair period guests would not be able to be accommodated at the hotel.

The meeting of September 28, 2005

- [11] She recalled that a staff meeting took place on September 28, 2005. She attended the meeting. Mr. Prosper was also present. Mr. Prosper informed everyone that one block of the hotel was required to be closed. This was to facilitate repairs being done to it. There were concerns of a health and safety nature.
- [12] In answer to Ms. Thomas, Ms. Samuel informed the Court of further observations which were mentioned to her by Mr. Prosper at the meeting of September 28, 2005. These included (a) that the hotel would be closed for major refurbishment; (b) that during the period of its closure all persons including herself should try to obtain alternative employment; (c) all of the work force would be severed; (d) that she was a good employee; (e) that when the hotel was re-opened she would be rehired (she assumed in her former position as Head of Housekeeping).

The meetings of October 3 and 4, 2005.

- [13] Ms. Samuel initiated a meeting with Mr. Prosper on October 3, 2005. It commenced at 5:30 pm at the hotel. Ms. Samuel informed the Court that Ms. Prosper told her (a) that all persons including herself shall be severed; (b) the hotel was not generating any income; (c) the hotel would keep on its payroll "*a few persons*"; (d) the hotel would pay to her \$85,000.00 which represents the severance payment which was due to her. She was not chosen to continue working with the hotel.
- [14] Ms. Samuel challenged Mr. Prosper upon the accuracy of the severance payment. She opined that according to her calculations she should have been paid \$100,000.00. She was not expecting to be paid anything less than that sum. In addition she stated that Mr. Prosper refused to give her a letter which contained the sum of \$85,000.00 to be paid to her.
- [15] She met with Mr. Prosper on October 4, 2005. He reiterated to her that the figure of \$85,000.00 was correct. She continued to work and finished inventory. She completed everything that she was required to do. After this her employment with the hotel ended on October 6, 2005. She never discussed with Mr. Prosper the matter of severance payment.
- [16] Ms. Samuel subsequently caused the matter of the accuracy of her severance payment to be determined by the Labour Commissioner. The Labour Commissioner's Department informed both parties that the correct calculation should have been \$100,000.00 as opposed to \$85,000.00 which the Employer was prepared to pay to her. She received this sum on November 3, 2005 from the Labour Commissioner's Department.

The advertisement of November 2, 2005

- [17] Ms. Samuel noticed that an advertisement appeared in the Daily Observer Newspaper on November 2, 2005. The hotel placed this advertisement which invited persons to apply to be considered for the position of Head Housekeeper. (The advertisement was produced and marked as “MS-1”.)
- [18] As a consequence of having read the advertisement Ms. Samuel applied for the position as Head Housekeeper. She was interviewed by Mr. Prosper. He informed her that the hotel was not hiring anyone for the position as “*the hotel was preparing itself by making advanced preparations.*”

Her mitigation efforts

- [19] Ms. Samuel submitted applications to British American Insurance Company, St. James Travel and Tours, Carlisle Bay Hotel and Pineapple. She received a response from Pineapple. The company informed her that no vacancies existed. She was interviewed at Carlisle Bay and St. James Travel & Tours. She was not successful in gaining employment with any of these two companies.
- [20] On October 16, 2006 she obtained employment at the Moravian Church. She works as an Administrative Assistant. She earns \$2,500.00 per month. No evidence was led with respect to whether or not this is a net or gross amount.

LEGAL PROCEEDINGS

[21] Ms. Samuel commenced legal proceedings by filing a Reference. It is dated November 10, 2005. In that Reference she claimed “**Dismissal**”. This is interpreted to mean that she was unfairly dismissed. Her Employee’s Memorandum was filed on November 5, 2007. In that document she claims that she was unfairly dismissed. A Witness Statement was filed on her behalf on April 25, 2008.

[22] The Employer’s Memorandum was filed on January 23, 2008. A Witness Statement was filed on the Employer’s behalf on May 23, 2008.

The Case of Mr. Barrymore Gordon

[23] Mr. Barrymore Gordon is 44 years of age. He resides at Bowl Crescent, Ferris Farm in the parish of St. John’s in Antigua. He was employed with the hotel from July 28, 1986. He is the holder of a Degree in Electrical Engineering from the Antigua State College. He has a City in Guilds qualification.

[24] He commenced his employment as an electrician. Like Ms. Samuel he obtained promotions with the Employer. He rose to the rank of Maintenance Manager. In this capacity he became a Departmental Head. He earned \$5,900.00 per month. Whether net or gross is uncertain.

The meeting of July 13, 2005

[25] He attended a Heads of Department meeting on July 13, 2005. Mr. James Prosper chaired it. It took place at the hotel. He voiced concerns to Mr.

Prosper concerning whether or not refurbishment work would take place. Mr. Gordon informed Mr. Prosper that some plumbing and air conditioning work was required to be done. In addition the water tank needed to be fixed. As well there was termite infestation in the executive block. In his opinion between 6 weeks to 2 months would suffice for this work to be completed.

[26] In response to Ms. Thomas he stated that Mr. Prosper did discuss with him the need to refurbish the hotel. Mr. Gordon expressed certain concerns to Mr. Prosper with regard to the hotel's condition. He would not state that the hotel was in serious disrepair. He agreed with Ms. Samuel's assessment of what was required to be done with the hotel. In his opinion these repairs were of a minor nature.

[27] At that meeting Mr. Gordon informed the Court that Mr. Prosper told the Departmental Heads that the hotel "***would be undergoing minor repairs.***" At this meeting the matter of severance payment was not discussed with him. Mr. Prosper told him that the repairs would take between 6 weeks and 2 months.

The meeting of September 28, 2005

[28] On September 28, 2005 a meeting of all staff took place. According to Mr. Gordon, Mr. Prosper attended this meeting. Mr. Prosper informed the staff that "***the hotel would be closed for major refurbishment. Mr. Prosper advised me and the staff members to seek alternative employment. The reason why I was so advised was that the hotel was going to be closed. I do not recall the length of the closure. Mr. Prosper did say that all employees***

were going to be severed. At that meeting I was told that the hotel would be closed from about the end of September 2005. He did not say on what date the hotel would be re-opened. I had no reason to dispute what was said to me in the meeting of September 28, 2005, that the hotel was going to be closed. I had no reason to dispute the contention of the hotel that it was going to be closed for major refurbishment. I had no reason to dispute that the closure of the hotel to facilitate major refurbishment would require the severance of all employees. My only concern on October 4, 2005 was the correct calculation of my severance payment. At no time was I guaranteed re-employment by the hotel upon its re-opening."

The meeting of October 4, 2005

- [29] On October 4, 2005 a meeting occurred between Mr. Gordon and Mr. Prosper. It took place at the premises of the hotel. Mr. Gordon was **"completely taken by surprise"** on October 4, 2005 when he was presented with a severance payment cheque by Mr. Prosper. The reason for this was that as a part of the management team he thought that he should have been treated differently than non-management employees.
- [30] The sole concern which he raised with Mr. Prosper on October 5, 2005 was the correct calculation of his severance payment. According to Mr. Gordon, Mr. Prosper informed him that no re-employment would be guaranteed to him when the hotel was re-opened.

[31] At this meeting Mr. Prosper presented a letter to him. He refused to accept it. Mr. Prosper read the contents of it to him. His last date of employment was October 4, 2005.

[32] Mr. Gordon did not wish to be severed. He wanted to be part of the team to refurbish the hotel. In further answer to Ms. Thomas he said as follows:

“On 4th October 2005 the issue of unfair dismissal did not concern me at that time. The reason why unfair dismissal did not concern me on October 4, 2005 was because the hotel was going to be closed for major refurbishment.”

[33] Like Ms. Samuel, Mr. Gordon caused the matter of the correct quantification of his severance payment to be determined by the Labour Commissioner’s Department. A hearing with regard to this matter took place on October 13, 2005. The sum which the hotel had planned to pay him was EC \$106,056.62. The sum which the Labour Commissioner’s Department recommended that the Employer pay him was EC \$123,756.62. He received this sum from the Labour Commissioner’s Department on November 3, 2005.

[34] Mr. Gordon *“never recalled having any discussion with anyone at Rex to do with termination or severance.”*

Mitigation efforts

[35] Mr. Gordon is presently employed. He obtained employment from December 5, 2005 as a Maintenance Engineer. He works at Sun Sail. He earns \$7,500.00 per month. Whether or not this is gross or net is uncertain.

LEGAL PROCEEDINGS

[36] The Reference referred to at paragraph 21 hereof was also filed in support of Mr Gordon. His Employee's Memorandum was filed on November 05, 2007. He claims Unfair Dismissal. A Witness Statement was filed on April 25, 2008.

Employee's Legal Submissions

[37] (i) Mr. Joseph made the following submissions:

- (a) That the Employees were never given letters of dismissal.
- (b) No advance notice of their termination was given by the Employer.
- (c) The reason given for termination was not a "**just cause**". It is not in keeping with safe and sound industrial relations practices in Antigua & Barbuda.
- (d) At the meetings which were held with all parties "***at no time did Mr. Gordon or Ms. Samuel discuss termination with anyone.***"
- (e) The principles of natural justice dictate that any employer who acts fairly ought to have consulted with the employees.
- (f) With respect to both Employees their dismissal was harsh and unfair. They should be compensated.

(ii) No cases were cited in support of the above submissions.

Employer's Legal Submissions

[38] Ms. Thomas for the Employer made the following submissions:

- (a) The Employees' claim for a determination of the correct amount of their severance payment before the Labour Commissioner's Department having been determined in their favour, the Employee's are now estopped from pursuing a claim in the Industrial Court for unfair dismissal.
- (b) The facts do evidence a situation of redundancy. Ms. Thomas referred to the definition of redundancy at C3 and Section C 58 of the Labour Code. **Sundry Workers v Kings Casino Ltd. Civil Appeal No. 28 of 2001, The Antigua Workers Union v Joseph Dew Division of Dantzler W.I. Ltd Civil Appeal No. 2 of 1992 and U.S. Naval Facility v Lewis (1983) 31 W.I.R. 191** were submitted for the Court's consideration.

The Issues

[39] **The issues which require a determination are as follows:**

- (a) **Whether the Employees were unfairly dismissed or were they severed?**
- (b) **If the Employees were unfairly dismissed what is the level of compensation which is due to them?**
- (c) **If the Employees were severed were they given guarantees of new employment with the Employer?**

The Law

The Law

[40] (i) C 56 of the Labour Code states as follows:

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

The First Issue

Whether the Employees were unfairly dismissed or were they severed?

[41] As a consequence of the work to be done at paragraphs [44] and [45] Mr. Prosper informed the staff on July 13, 2005 that the work required the hotel to be closed for an indefinite period. Everyone was paid their severance payment. At this meeting both Employees attended. He did not tell the workers of the date when it would be re-opened. He promised them that he would inform them on a subsequent occasion when the hotel would officially close. He did hope that the hotel would be re-opened before the commencement of the next winter season. In answer to Mr. Joseph he stated that he hoped that the hotel would re-open in December 2005.

[42] Mr. Prosper attended a meeting of all staff members on September 28, 2005. His evidence was that he informed everyone present including the managers that the hotel was required to be closed for an indefinite period. This was to facilitate major refurbishment. The reason was that the hotel's main supplier Virgin Holidays had refused to give it any business until all of the issues about which it complained to the hotel, were resolved. These matters are outlined at paragraph [44].

[43] He did not recall having informed the staff on September 28, 2005 of the date of closure. The hotel first wanted to ensure that all severance payment calculations were agreed to with the trade union representatives. He did not inform the staff that they would resume their employment within two months after the closure of the hotel. He gave no guarantees of employment to any staff member. The hotel was eventually closed on October 3, 2005.

[44] At paragraph [42] Mr. Prosper referred to some issues which Virgin Holidays complained of to the hotel. He commenced employment with the hotel in July 2004. He became aware of certain problems in August 2004. Several guests made complaints of these matters. Virgin Holidays also complained to the hotel concerning the following matters:

- (a) The entire plumbing system was faulty. This resulted in the production of brown water;
- (b) The central air conditioning system was faulty. This produced flooding in the rooms in all parts of the hotel. This system was more than 30 years old;
- (c) The Executive Block's roof was infested with termites;
- (d) The sewer system plant was malfunctioning. The health authorities made complaints to the hotel;
- (e) The condition of the bathtubs was rusty;
- (f) The general condition of the hotel rooms posed some difficulty.

[45] In July, September and October 2005, the problems outlined at paragraph [44] were still evident. Mr. Prosper obtained advice on how to deal with them. He told the Heads of Departmental meeting on July 13, 2005 that (a) the entire hotel's piping would be redone; (b) the entire air conditioning system would be changed from a central one to the installation of individual

units in each room; (c) the Executive Block would be replaced; (d) the swimming pool would be filled in depth to 4 feet; (e) some work was required to be done on the **Warri Pier** restaurant; (f) some work to the **Ciboney** lounge was required be done.

[46] All parties gave evidence with regard to the reason why the hotel was required to be closed. Ms. Samuel stated *inter alia* that “***the hotel was in a terrible condition***”. She experienced this “***on a daily basis***”. Mr. Gordon’s evidence in cross examination is referred to at paragraph [28]. At the meeting of September 28, 2005 he “***had no reason to dispute that the closure of the hotel to facilitate major refurbishment would require the severance of all employees***”. His only concern on October 4, 2005 “***was the correct calculation of [his] severance payment.***”

[47] The hotel was unable to continue to do business after October 2005. This was due to (a) the need to refurbish the hotel and; (b) its main customer had ceased to do business with the hotel. No evidence was given by any of the two Employees that the hotel continued to conduct any business after it’s closure on October 3, 2005. No evidence was led by any party with respect to the date when the hotel recommenced business.

[48] Mr. Prosper informed the Court that he presented severance payment cheques to Ms. Samuel and Mr. Gordon. Letters which included these payments were prepared but were never signed by the two Employees. According to him neither party expressed any dissatisfaction with being severed other than that the quantum of the severance payment was incorrect in each case. This matter was resolved at the Labour Commissioner’s Department in their favour. The cheque of \$100,000.00 in favour of Ms.

Samuel was admitted as “**JP-1**”. The cheque in the sum of \$123,756.62 in favour of Mr. Gordon was admitted as “**JP-2**”.

- [49] The letters referred to at paragraph [48] written by Mr. Prosper to Ms. Samuel and Mr. Gordon were presented by Mr. Prosper and marked “**JP-3** and **JP-4**” respectively.
- [50] Ms. Samuel expressed concern to Mr. Prosper about the amount of money which she should have been paid for severance. She wrote to Mr. Prosper a letter dated October 3, 2005. It was admitted and marked “**JP-5**”. A verbal concern was expressed by Mr. Gordon.
- [51] Neither party expressed any other concern about their being severed by the Employer. Mr. Gordon wished to be a part of the team to refurbish the hotel. This was not allowed by Mr. Prosper. These matters apart, both were satisfied.
- [52] Both Employees received the respective sums due to them from the Employer. They collected their cheques at the Labour Commissioner’s Department on November 3, 2005. Subsequent to receipt of their cheques they cashed them. No money was ever returned to the hotel.
- [53] I have considered the evidence very carefully. I have taken into consideration the submissions of Mr. Joseph for the Employees and Ms. Thomas for the Employer. I am unable to find that there was a dismissal or an unfair dismissal of Employees.

[54] In all of the circumstances of this case I further find that the Employees were severed. They were entitled to compensation based upon the number of years of service multiplied by their latest salary. In this regard the Employees received the severance payment to which they were entitled.

The Second Issue

If the Employees were unfairly dismissed what is the level of compensation which is due to them?

[55] In light of the findings at paragraphs [53] and [54], there is no need to determine this issue.

The Third Issue

If the Employees were severed, were they given guarantees of new employment with the Employer?

[56] Having listened to all of the evidence and the submissions on behalf of both parties, I find that Mr. prosper made no offer of new employment to either or both of the Employees.

CONCLUSION

[57] I have listened to all of the witnesses. I have examined their demeanor. I have carefully examined all of the evidence and submissions on behalf of both parties. The relevant provisions of the Labour Code and The Industrial Court Act Cap. 214 were taken into consideration. In all of the circumstances of this case this Reference is hereby dismissed. There shall be no order as to costs.

Dated the 25th day of November 2008



PHILIP A. PILGRIM
President

I agree.



SAMUEL R. AYMER
Member

I also agree.



OSCAR A. FREDERICK
Member