

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 13 of 2007

BETWEEN:

LYSTRA SIMON

Employee

and

CARIBBEAN STAR AIRLINES LIMITED

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Glendina M. McKay

Member

The Hon. Samuel R. Aymer

Member

Appearances:

Watt & Associates, Attorneys-at-Law for the Employee

Marshall & Co., Attorneys-at-Law for the Employer

**2009: February 25,
May 20**

JUDGMENT

PILGRIM P.:

Historical Background

- [1] Caribbean Star Airlines Limited (afterwards sometimes referred to as “**Caribbean Star**”) at all material times operated a fleet of aircraft which was utilised to transport passengers from V.C. Bird

International Airport to various destinations throughout the Caribbean and beyond.

- [2] Ms. Lystra Simon, the Employee herein resides at Upper Fort Road in St. John's in Antigua. She is 26 years old.
- [3] By a contract of employment dated June 06, 2002 Ms. Simon was employed by Caribbean Star as a Flight Attendant. Her appointment took effect from June 04, 2002. Her basic initial starting salary was \$1,200.00 per month.
- [4] During the currency of her employment Ms. Simon gave evidence that she received "***commendation from the airline and an increase in salary to \$2,000 per month which was (her) salary at the time of (her) firing.***" According to her she "***had a good employment record with the airline.***"
See her Witness Statement at Paragraphs (10) and (11).
- [5] In answer to Mr. Hugh Marshall, Attorney-at-Law for the Employer, Ms. Simon stated *inter alia* that in December 2004 her monthly pay rose to \$2,000.00. Any work done beyond 50 hours in any week would result in her obtaining a higher salary.
- [6] In further answer to Mr. Marshall, Ms. Simon stated that she knows Mr. Boris Emmanuel. Learned Counsel referred her to the Witness Summary of Corey Isaac on behalf of the Employer.

[7] Mr. Corey Isaac resides at Cedar Valley Springs in St. George's in Antigua. He was employed as a Human Resource Supervisor with the Employer from January 15, 2004 until the airline ceased its operations on November 15, 2007.

[8] In Mr. Isaac's Witness Summary he stated at **paragraph [3]** as follows:

"The employee file contains a number of reports and complaints concerning the Employee's attitude and behaviour to or in the presence of passengers of the Employer."

[9] At **paragraph [4]** of the Witness Summary Mr. Isaac stated as follows

"The last such report was made on the 25th day of January 2005. The said complaint related to the Employee's conduct on a flight in which she made rude, disparaging remarks in conversation with a fellow employee and spoke in a loud tone and an unprofessional manner while neglecting her duties."

[10] The report of January 25, 2005 which was referred to by Mr. Isaac concerned Ms. Simon's behaviour on a Caribbean Star flight which originated from Grenada to Antigua on January 25, 2005. It was flight 792. In summary Mr. Boris Emanuel who said that he was a passenger on flight 792, sent an electronic mail from the email address of one Teresa Emanuel (temanuel@stanfordeagle.com) to Ms. Jan Sirjusingh, the Human Resource Director of Caribbean Star.

It was also sent to sjohn@flycaribbeanstar.com

[11] The essence of Mr. Emmanuel's electronic mail is that Ms. Simon engaged in ***"unprofessional conduct."*** This electronic mail was admitted as **"C1-2"**.

[12] As a consequence of Mr. Emmanuel's complaint, Caribbean Star by a letter dated January 31, 2005 wrote to Ms. Simon. She was requested to respond to the complaint on or before February 5th, 2005. This letter was admitted as **"C1-3"**. It read as follows:

"CARIBBEAN STAR

January 31, 2005

***Ms. Lystra Simon
c/o Flight Operations Department
Caribbean Star Airlines
Airport Road
St. John's, Antigua
Dear Ms. Simon***

On the 25th January 2005 you operated Flight 792.

I am in receipt of a report from Mr. Boris Emanuel regarding your behaviour on the flight.

Please submit a written report of the incident no later than the 5th of February 2005. A copy of the report is attached.

Sincerely

***Mrs. Rosemarie Fernandez
Acting In-Flight Services Co-ordinator***

***Cc: Capt. John Murray - Vice President Operations &
Ground Services***

Cc: Ms. Jan Sirjusingh - Director of Human Resources

- [13] Before the expiration of February 05, 2005, Ms. Simon was summarily dismissed by a letter dated January 31, 2005. This letter was admitted into evidence and marked “LS-1”. It read as follows:

“CARIBBEAN STAR

31st January 2005

***Ms. Lystra Simon
C/o Caribbean Star Airlines Limited
Coolidge Industrial Park
St. George's
Antigua.***

Dear Ms. Simon:

Caribbean Star Airlines has a vision to become the best airline in the Caribbean and the world. Retention of staff with the abilities and commitment to the airline and this vision is crucial to obtaining that goal. A cohesive team of management and staff working together with seamless cooperation and flawless execution is the only way that this objective shall be achieved.

Caribbean Star Airlines Limited has had to make the hard decision as to which of our staff we consider shall enable us to achieve that vision. The Management of the Airlines has determined that we do not consider that you shall assist us to meet that goal.

We have therefore decided to terminate your employment with Caribbean Star Airlines with immediate effect. We appreciate

your past efforts and are eager to assist you as much as possible. Accordingly, we enclose a cheque in the amount of \$13,333.00 to cover your Equity, 1 month's salary in lieu of Notice and 3 months additional pay. Any outstanding vacation or overtime entitlement will be forwarded in due course.

In the interim we ask that you immediately return all company property to your Manager. This is to include company identification, security passes and uniform.

Please do not return to your office or the offices of Caribbean Star Airlines other than by prior arrangement to return company property. If you have to collect any personal property from company premises then please notify your Manager so that this can be arranged.

We wish you well in your future endeavours.

Yours sincerely

*Jan Sirjusingh
Human Resources Director
Caribbean Star Airlines Limited'*

EFFORTS AT MITIGATION

- [14] After being dismissed by Caribbean Star, Ms. Simon obtained employment with LIAT (1974) Ltd as a Flight Attendant trainee on March 21, 2005. Her salary was \$1,200.00 per month. She continued in this position with LIAT until January 2006. She resigned her position with LIAT to pursue training as a pilot. She qualified as an airline pilot. No date was given when this event took place.

- [15] After qualifying as an Airline Pilot, Ms. Simon gained employment with Caribbean Aviation on September 02, 2007. In this regard, she commenced employment as a First Officer on the Twin Otter aircraft. Her base salary was \$6,270.00. Her gross monthly salary is \$7,100.00.

LEGAL PROCEEDINGS

- [16] As a result of having been dismissed by Caribbean Star a Reference was filed on Ms. Simon's behalf dated November 19, 2007.
- [17] The Employee's Memorandum was filed on November 19, 2007. On April 07, 2008 the Employer caused its Employer's Memorandum to be filed. The Employer asserts at **paragraph [9]** of the Memorandum as follows:
- “The termination was consistent with Section C59 of the Antigua and Barbuda Labour Code and consistent with the Written Agreement of employment. The termination was fair and reasonable in all the circumstances.”***
- [18] Ms. Simon filed her Witness Statement on November 18, 2008. Mr. Corey Isaac's Witness Summary on behalf of the Employer was filed on November 14, 2008. Both of these Statements were admitted into evidence with the consent of both Attorneys-at-Law.

THE ISSUES

[19] The issues which require a determination by this Court are as follows:

- (i) **Did Caribbean Star carry out a sufficiently thorough investigation of the complaint made by Mr. Boris Emmanuel to the Employer with regard to the incident of January 25, 2005?**
- (ii) **Was the Employee's behaviour complained of by the Employer with respect to Caribbean Star Flight 792 from Grenada to Antigua of such a nature as to merit summary dismissal in accordance with Section C 58 (1) (a) and (2) of the Antigua and Barbuda Labour Code?**
- (iii) **If the Employee is found to be unfairly dismissed. What is the quantum of damages to which she may be entitled?**

EMPLOYEE'S LEGAL SUBMISSIONS

[20] In summary Dr. Dorsett Attorney-at-Law of Watt & Associates, Attorney-at-Law for the Employee submit that since the evidence of customer complaints was not stated in the letter of dismissal, the Employer is bound by the reasons stated therein. A fortiori such complaints should be rejected by this Court.

EMPLOYER'S LEGAL SUBMISSIONS

[21] The Employer's submissions are more appropriately referred to at **paragraphs [29] & [39]** of this judgment.

THE LAW

[22] An employee may not be dismissed without just cause if he or she has successfully completed his or her probationary period of employment. See Section C 56 of the Labour Code.

[23] If certain conditions are satisfied, an employee's dismissal shall not be unfair. Such circumstances are set out in Section C58 (1) of the Labour Code. One of those circumstances is misconduct. The test which is used to determine whether a dismissal was unfair is set out at Section C58 (2) of the Labour Code. The relevant provision of Section C58 (1) and Section C58 (2) state as follows.

“C 58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

- (b);
- (c);
- (d);
- (e);

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

(2) “The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though the employer acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee’s dismissal.”

[24] There is a relationship between the reason assigned by the Employer for the Employee’s dismissal and Section 59 (1) and (2) of the Labour Code. Section C59 (1) (a) state as follows:-

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

“C59. (1) An employer may terminate the employment of an employee where the employee has

been guilty of misconduct or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b);

(c);

- [25] Lord James in **Clouston & Co. Ltd v Corry [1906]** A.C.122 commented upon the degree of misconduct that is required to satisfy Section C58 (1) (a) of the Labour Code. At page 129 the Learned Judge stated *inter alia* as follows:

“There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal. In such a case the question whether the misconduct proved establishes the right to dismiss

the servant must depend upon facts – and is a question of fact.”

THE FIRST ISSUE

Did Caribbean Star carry out a sufficiently thorough investigation of the complaint made by Boris Emanuel to the Employer with regard to the incident of January 25, 2005?

[26] Ms. Simon gave evidence with respect to the incident of January 25, 2005. She stated *inter alia* as follows:

“I received the complaint on February 01, 2005 in the morning. In the evening of February 01, 2005 I got my letter of dismissal. I was asked to give a written response but I was fired in the afternoon.”

[27] Mr. Isaac also gave evidence in relation to the letter of January 31, 2005 which was written by Caribbean Star to Ms. Simon. He stated *inter alia* as follows:

“Based on what I read and was told, the reason for her dismissal was based on the complaints as stated in paragraph [3] (of my Witness Summary) and by her lack of response. I mean with reference to the incident of January 25, 2005. In this case she was not given until February 05,

2005 to respond as she was terminated on the same day being by letter of January 31, 2005. In this case the company failed to follow its own procedure.”

[28] The Employee was invited by the Employer to “***submit a written report of the incident no later than the 5th of February, 2005.***” Before the Employee was allowed an opportunity to comply with the Employer’s request, the Employer dismissed her on the same day when she was written the letter of dismissal.

[29] Ms. Cherissa Roberts-Thomas, of Marshall & Co. Attorneys-at-Law for the Employer in her Written Submissions dated April 09, 2009 and filed on April 20, 2009 stated *inter alia* at page 3 as follows;

“The Employer conceded that although an opportunity was given for the (Employee) to respond to the complaint by the passenger the time had not elapsed prior to her termination. The Employer accepts it may have acted unreasonably and contrary to C59 of the Antigua & Barbuda Labour Code in the circumstances. Therefore the Employer will not challenge the issue of unfair dismissal on the aforementioned basis solely. The Employer disputed the Employee’s bald assertion of dismissal for union activity and maintains that position as no evidence was adduced to support such an allegation.”

[30] If the Employer's "*own procedure*" afforded the Employee with an opportunity to respond to the customer's complaint, it therefore follows that the Employer ought to have afforded her the right to comply before she was dismissed. Although this case involves no allegation of theft, that the Employee's conduct was being investigated, then the process ought to have been allowed to be completed before a final decision is made.

[31] In this case as in **The Epicurean Limited and Madeline Taylor Civil Appeal No. 4 of 2003** the Employer "*did not carry out any proper investigation.*" Although in this case Ms. Simon was invited to put up a defence the Employer as in the Epicurean, "*took her livelihood in clear breach of the rules of natural justice.*"

THE SECOND ISSUE

Was the Employee's behaviour complained of by the Employer with respect to Caribbean Star Flight 792 from Grenada to Antigua of such a nature as to merit summary dismissal in accordance with Section C 58 (1) (a) and (2) of the Antigua and Barbuda Labour Code?

[32] Ms. Simon gave evidence with regard to the incident of January 25, 2005. In answer to Mr. Marshall she stated *inter alia* as follows;

"I am not familiar with the events as stated in the letter of

Boris Emmanuel. I was the Flight Attendant on January 25, 2005. I was engaged in a conversation with a pilot who was not flying the aircraft. My job is to play a tape. I packed some supplies before the tape had been completed. Throughout the flight I continued to converse with the pilot. The topic of my conversation was not that of my co-workers, supervisors or other passengers. My conversation could not be overheard by other passengers on the flight.”

[33] No evidence was led by the Employer which justified its allegation that Ms. Simon ***“made rude, disparaging remarks in conversation with a fellow Employee and spoke in a loud tone and an unprofessional manner while neglecting her duties”*** on January 25, 2005 in her capacity as the Flight Attendant on Caribbean Airlines Flight 792 from Grenada to Antigua & Barbuda.

[34] Mr. Isaac who appeared and gave evidence for the Employer was of no assistance to help the Court to understand the events of January 25, 2005. In his evidence in response to Dr. Dorsett he stated *inter alia* as follows:

“I was not involved in Ms. Simon’s termination. Based on what I read and was told, the reason for her dismissal was based on the complaints as stated in paragraph [3] (of his Witness Summary) and her lack of response with reference to the incident of 25th day of January, 2005.”

- [35] No evidence was led by the Employer with regard to the *“number of reports and complaints”* made by persons against the Employee. Ms. Simon testified that she was aware of one prior complaint. This took place sometime about April 2004. No specifics of this incident were put forward by either party.
- [36] Indeed if such reports and complaints were received by the Employer against the Employee surely the Employer was afforded *“a number of”* opportunities to properly issue the Employee with appropriate letters of warning. That no evidence was led by the Employer to show that letters of warning were issued to the Employee by the Employer strongly suggests that no such reports and complaints were ever made at all.
- [37] That letters of warning would have been fitting to be issued in this case to the Employee is borne out by reference to the English Industrial Tribunal case of **Houston v G. H .Zeal Limited, [1972] I.T.R331.**
- [38] In this case no evidence was led to show that Ms. Simon was guilty of any misconduct of such a serious nature as to negatively impact on the Employer’s business so as to make her dismissal reasonable in accordance with Sections C58 (1) (a) and C59 (1) (a) of the Labour Code.

[39] The Employer did act “*unreasonably and contrary to C59 of the Antigua & Barbuda Labour Code in the circumstances of this case.*” - See Cherissa Roberts-Thomas, Attorney-at-Law for the Employer (op cit).

[40] In all of the circumstances of this case the dismissal of the Employee was unfair.

THE THIRD ISSUE

If the Employee is found to be unfairly dismissed what is the quantum of damages to which she may be entitled?

[41] The award under the four established headings is as follows:

a) Basic Award for Loss of Protection

This award is calculated in the same manner as severance payment. The sum to which the Employee is entitled under this heading is

$$(\$2,000 \times 2) + (\$2,000 \times \frac{7}{12}) + (\$2,000 \times \frac{27}{365}) \text{ or } \$5,314.60.$$

b) Immediate Loss

For 10 months from March 2005 to December 2005 the Employee sustained a monthly loss of \$800.00. She then obtained training as an airline pilot. During

this period she obtained no income. In the circumstances, I award \$800 x 10 and \$2,000 x 10. The entitlement is \$28,000.00.

c) Manner of Dismissal

No award is made under this heading.

d) Future Loss

No loss is sustained under this heading.

OTHER AWARDS

Vacation Pay

The Employee was entitled to 16 days vacation pay for the year 2004. The sum awarded is (\$24,000x 16)

365

or \$1,052.05.

[42] The Employer shall pay to the Employee (\$34,366.65 - \$13,333.00) or **\$21,033.65** on or before June 30, 2009. There shall be no order as to costs.

Dated this 20th day of May, 2009



PHILIP A. PILGRIM
President

I agree



GLENDINA M. MCKAY
Member

I also agree



SAMUEL R. AYMER
Member