

Original

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 14 of 2007

BETWEEN:

CLARENCE CRAWFORD

Employee

and

HALCYON COVE

by rex resorts

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Edward T. Henry

Member

The Hon. Jessie F. Kentish

Member

Appearances:

**Mr. Egbert Joseph – Hotel Management Association
for the Employee**

**Ms. Veronica E. Thomas - of Richards & Co. Attorneys-at-
Law for the Employer**

2009: March 27

May 21

JUDGMENT

PILGRIM P.:

The essential facts

[1] Halcyon Cove by rex resorts popularly known as Rex Halcyon Cove Resort is one of several hotel establishments to be found in Antigua & Barbuda. It represents one of the many beautiful hotel properties

which provide accommodation for visitors to the country and locals alike.

- [2] Clarence Crawford, the Employee herein resides at Lightfoot Development, St. Georges Parish in Antigua. He commenced his employment relationship with Halcyon Cove, the Employer herein on October 15, 1997. He was first employed as a Night Auditor.
- [3] He was subsequently promoted to the position of Senior Night Auditor. This is primarily an accounting function. In his capacity as Senior Night Auditor he was responsible for (a) posting all charges of expenditure to the guests' accounts; (b) greeting and/or checking in all arriving guests after 11.00 p.m.; (c) handling all guest and/or staff complaints; (d) dealing with those guests who departed the hotel before 7.00 a.m. He worked the 11.00 p.m. to 7.00 a.m. shift for five days every week.
- [4] Mr. Crawford's immediate superior officer was Mr. West. He held the position of Night Manager and Auditor.

The events of July 31, 2003

- [5] On July 31, 2003 Mr. Crawford reported for duty in the usual manner at Halcyon Cove. He took up duties for the 11.00 p.m. to 7.00 a.m. shift. On the Employer's premises a Warri Pier is located. Functions are held at this location on some occasions.

- [6] On July 31, 2003 a function was in progress at the Warri Pier. The playing of music was involved. According to Mr. Crawford's evidence, the function was a wedding reception party for a Mr & Mrs. Bryan and their several guests. Mr. Crawford had no knowledge of the wedding reception prior to 11.45 p.m.
- [7] Sometime after 11.45 p.m. Mr. Crawford received a complaint from a member of staff that some guests were of the view that the noise which emanated from the Warri Pier was of a loud nature. It disturbed their rest.
- [8] Mr. Crawford went to the Warri Pier. He inquired as to who was in charge of the function. He was introduced to Mr. Bryan. He told Mr. Bryan of the nature and extent of the guests' complaints. Mr. Bryan was reluctant to do so, but he turned down the volume of music. Mr. Bryan's action satisfied Mr. Crawford. As he left all was well. However, as he was approaching the front desk, the volume of music appeared to be louder in its pitch and intensity.
- [9] One of the guests who previously complained of the noise did so again. Mr. Steadroy Patrick is the hotel's Security Supervisor. He was on duty on the night of July 31, 2003. Mr. Crawford called him. They both went to a room. It adjoined that of one of the guests who complained. According to Mr. Crawford, Mr. Patrick was of the opinion that the ***"noise level was not loud enough to prevent him from falling asleep"***. Notwithstanding Mr. Patrick's opinion however, both parties went to the Warri Pier. Mr. Bancroft James was

employed as a Maintenance Operator in 2003. Mr. Patrick and Mr. James appeared on the Warri Pier with Mr. Crawford.

[10] Mr. Crawford in his evidence in chief stated *inter alia* that he introduced himself to Mrs. Bryan the bride of Mr. Bryan. He walked away to a clear area and awaited Mrs. Bryan's arrival. Mrs. Bryan approached him and according to Mr. Crawford, she accused him of (a) accosting her in a rude manner and (b) **"hogging her up"**. She shouted insults at him. He walked away and returned to the front office.

[11] A clearer picture of the scene at the Warri Pier emerges from the testimony which Mr. Crawford gave in answer to the cross examination by Ms. Thomas. He stated *inter alia* as follows.

"I did say to Mrs. Bryan that she was not the only guest at the hotel. There were other guests. I need the music to be turned down. This was in response to her saying to me that she paid for the function and she had certain rights. I raised my hand and walked away after her abuse."

[12] In further answer to Ms. Thomas, Mr. Crawford stated that ***"No other Guest came in the presence of the wife or I."*** According to Mr. Crawford ***"she called me stupid and used stronger words."*** ***I was more upset by the lady accusing me of hogging her up. If people are looking on and come to the conclusion that I was visibly upset that is their perception. I am not aware of other persons coming on to the board walk in defense of Mrs. Bryan. I had no communication***

with anyone else. At the time this was going on Mr. James was about 10 – 12 yards away. During the incident I uttered no indecent language. Walking away I said to myself “My God, I can’t believe this woman to myself.” I do not practise indecent language. As I was exiting the Pier there were two other persons. I do not know who they were. They could have heard what I said. Engaging in that discussion I acted in the best interest of the Employer.”

- [13] Mr. Bancroft James gave evidence of what he understood occurred on July 31, 2003. He was *“a witness to an incident between Mr. Clarence Crawford and a guest”* on July 31, 2003. He was on duty on this night from 11.00 p.m. to 7.00 a.m. the following morning. Mr. Crawford told him of certain complaints which arose from some guests. These concerned noise from the Warri Pier.
- [14] Mr. James watched as Mr. Crawford went to the Warri Pier. According to him, Mr. Crawford went to the disc jockey. He did not hear Mr. Crawford say anything. In his opinion he was of the view that Mr. Crawford was indicating to the disc jockey to decrease the volume of the music. Mr. Crawford met with no success in this regard.
- [15] According to Mr. James, Mr. Crawford moved away from the disc jockey. He spoke with Mrs. Bryan. A wedding party was taking place. He was about 10 feet away from where Mr. Crawford was standing. He heard Mr. Crawford talking to Mrs. Bryan about the noise and what problems he is having with the in-house guests, so he

wanted the music turned down.

- [16] Mr. James heard Mrs. Bryan telling Mr. Crawford that *“she paid her money for that activity so she thinks that she has the right to go on with the party.”* In response to this according to Mr. James, Mr. Crawford told her that *“this is a hotel and the rules of the hotel are that when the guests are sleeping you can’t constantly have music playing.”*
- [17] In Mr. James evidence he was of the opinion that *“the lady was gearing up for something. If you pay your money then she would get mad.”* According to Mr. James, *“Mr. Crawford knows that he is right, because that’s the company rule that after 11.00 p.m. the guests are not to be disturbed.”*
- [18] According to Mr. James, Mr. Crawford and Mrs. Bryan *“were talking rough to each other, but I could not say what words were being used by Mr. Crawford or the lady to each other. I could see her with her hands in the air getting mad and she was mad, both of them were very close.”* This exchange lasted for about 2.5 to 3 minutes. Mr. James suggested to Mr. Patrick to *“get Mr. Crawford out of here before it escalates.”* Mr. Crawford returned to the front office.
- [19] Mr. James also gave evidence that some of the party guests came behind Mrs. Bryan in support of her. They however did not join in the discussion between Mr. Crawford and Mrs. Bryan.

- [20] The Personnel Manager telephoned Mr. James at his residence. He informed her of the circumstances of the evidence which he gave.

The Employee's dismissal

- [21] As a consequence of the events which took place on Thursday July 31, 2003 Mr. Crawford was dismissed by his Employer by letter dated August 07, 2003. His dismissal took effect from August 07, 2003. The letter of dismissal was admitted into evidence. It was marked as "CC1." It read as follows.

**"REX
RESORTS**

Rex Halcyon Cove

August 07, 2003

***Mr. Clarence Crawford
Sr. Night Auditor
Rex Halcyon Cove***

Dear Sir:

I received a report from one of our guests (Mrs. Bryan) that on the morning of Thursday July 31st you verbally abused her and used indecent language to her in the presence of her wedding party while she was on the Warri Pier.

Two other members of staff were present at the time of the incident and they also confirmed the report. Shift Leader Steadroy Patrick intervened by physically restraining you because he figured that you were completely out of control.

Your entire conduct on the evening in question, coupled with your use of obscene language to a guest has left management

*with no other choice but to dismiss you effective today
Thursday August 07, 2003.*

*Upon return of uniforms and other hotel property, you will be
paid your earnings to date plus any outstanding vacation.*

Yours faithfully,

*Sonya Grant
Personnel/Training Manager*

*Cc: Hotel Accountant
Executive Assistant Manager
Night Auditor ”*

Efforts to mitigate his loss

- [22] During his period of employment with the Employer he was last employed earning a net weekly wage of \$635.00 inclusive of the payment of a service charge.
- [23] Between August 07, 2003 and September 2004 he wrote applications to some employers seeking alternative employment. These entities included Sandals Resort, Carlisle Bay Resort, Sticky Wicket, West Indies Oil, Stanford Financial Corporation, and Antigua Public Utilities Authority.
- [24] He travelled to Tortola in August 2004. There he obtained interviews with Long Bay Hotel, Mariner's Inn and Little Dicks Hotel. He was unsuccessful in this regard. These mitigation attempts took place between September 2003 and August 2004.

- [25] He first obtained employment in Antigua at Jolly Harbour in September 2004 as a General Assistant. He earned a net salary of \$3,400.00 per month.
- [26] He resigned from Jolly Harbour in January 2005 and obtained employment at Long Bay Hotel in Tortola as the Operations Manager. In this position he earned US\$3,500.00 per month.
- [27] Mr. Crawford is now employed at Bryson & Co. Ltd in its Shipping Department. He is the Operations Manager. He earns \$4,500.00 per month. In addition he obtains a travelling and clothing allowance.

LEGAL PROCEEDINGS

- [28] Mr. Crawford commenced proceedings in this Court by causing a Reference to be filed on November 28, 2007.
- [29] The Employee Memorandum was filed on January 18, 2008. The Employee claims that he is entitled to (a) Vacation Pay, (b) Notice Pay and (c) Basic Award for loss of protection (or severance payment) and (d) Immediate loss (or loss of earnings) as a consequence of being unfairly dismissed.
- [30] By a Memorandum of the Employer filed on February 23, 2009 at **paragraph [6]** thereof the Employer *“denies that the Employee’s dismissal was unfair and contends that his termination was for good*

cause within the limitations of Section C59 (1) of the Antigua & Barbuda Labour Code, Cap.27”

- [31] As a consequence of the Employer’s assertion at **paragraph [30]** the Employer is of the view that the Employee is not entitled to any compensation as claimed. The Reference should be dismissed.
- [32] The Employee filed his Witness Statement on February 10, 2009. Mr. Brancroft James deposed to his Witness Statement on February 23, 2009. Both of these Witness Statements were admitted into evidence by consent of both parties.
- [33] The Employee was the only witness who gave evidence in support of his case. Mr. Brancroft James gave evidence on behalf of the Employer.

THE ISSUES

- [34] The triable issues are as follows:
- (i) *Was the Employee’s conduct on the morning of July 31, 2003 of such a nature as to justify the Employer to summarily dismiss the Employee having regard to Section C 58(1) (a) and (2) of the Antigua and Barbuda Code (afterwards called “the Labour Code”)?*
 - (ii) *In the event that the circumstances of July 31, 2003 did not amount to misconduct which justified the Employer’s*

dismissal of the Employee, what is the measure of damages to which he may be entitled?

EMPLOYEE’S LEGAL SUBMISSIONS

[35] Mr. Joseph made certain Written Submissions. They were filed on April 15, 2009. In summary, Mr. Joseph repeated the evidence which was given by both parties. Taking into consideration all of the evidence, Mr. Joseph asserts that *“there was no just cause”* to dismiss Mr. Crawford.

See paragraph [24]. He referred the Court to **Calvert Aaron and Club Antigua Ref. No. 1 of 1999**

EMPLOYER’S LEGAL SUBMISSIONS

[36] Ms. Thomas Attorney-at-Law for the Employer stated *inter alia* at page 5 of her Written Submissions filed on April 20, 2009, *“that based on the evidence of Mr. Brancroft James of the actual circumstances which existed, the Employer acted reasonably in terminating the Employee.”* In the alternative *“the Employee through his own misconduct contributed to his termination.”* Any amount of damages to which the Employee may be entitled to should be reduced by 30%.

In her submissions Ms. Thomas referred the Court to **Antigua Village Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992.**

THE LAW

[37] Section C56 of the Labour Code confers a right upon an Employee not to be unfairly dismissed without just cause if his probationary period with an Employer has been concluded.

[38] C 58 (i) (a) and (2) of the Labour Code read 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."

[39] The nature and extent of the misconduct referred to in Section C58 (1) (a) of the Labour Code is defined in Section C59 (1) (a) for the purposes of the facts before the Court. That Section states 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);

[40] The degree of misconduct which is required to be obtained in order that the provisions of Section C58 (1) (a) of the Labour Code are satisfied have been set out in many cases. One of them is **Clouston & Co. Ltd v Corry [1906] A.C.122**. In that case Lord James who delivered the

judgment of the Privy Council stated *inter alia* at **page 129**.

“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 fulfilment 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.”

- [41] With regard to the burden and standard of proof which are to be met in this case, I derive much assistance from **Berridge, J.A. in Cable & Wireless (W.I) Ltd v Hill & others (1982) 30 W.I.R. 120**. At page **129** of the judgment, Berridge J.A. stated *inter alia* that the *“burden of proof was on the company to show “just cause” for dismissing the employees and that summary dismissal constituted a “strong measure” the standard of proof should be strict persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content.”*

- [42] In **Calvert Aaron and Club Antigua (op cit) Maundy P.** at **paragraph [14]** of the judgment stated *inter alia* as follows

“As a general rule Dismissal/Summary Dismissal should not be ordered for a first offence unless it falls within one of the exceptions, viz, gross misconduct, where the Employee was caught in the act of committing a serious breach of duty or had committed a serious criminal offence. Further, there should be an investigation and consultation before the termination, thereby allowing the Employee to be heard.”

THE FIRST ISSUE

Was the Employee’s conduct on the morning of July 31, 2003 of such a nature as to justify the Employer to summarily dismiss the Employee having regard to Section C58 (I) (a) and (2) Labour Code ?

[43] The letter of dismissal from the Employer dated August 07, 2003 contains the reasons why the Employer dismissed the Employee forthwith. The reasons were stated as (a) verbal abuse; (b) use of indecent language to Mrs. Bryan in the presence of her wedding party; (c) the Employee’s behaviour being completely out of control; and (d) the Employee’s entire conduct.

[44] According to the Employer the events outlined at **paragraph [43]** were *“confirmed”* by *“two other members of staff (who) were present at the time of the incident...”*

[45] One of the staff members who was referred to in the letter of

dismissal was Mr. Bancroft James. His evidence was clear and very helpful to the Court. It is contained at **paragraphs [13] to [20]** of this judgment. Nowhere in Mr. James' evidence did he mention that Mr. Crawford was abusive or used any indecent language of whatsoever nature to Mrs. Bryan or to any of the other guests at or near the Warri Pier on July 31, 2003. In Mr. James' evidence he described Mr. Crawford's actions as an Employee who was acting under much restraint in the exercise of his duty to persuade Mrs. Bryan to lower the music which kept some guests awake.

[46] From all of the evidence which was available to this Court, I conclude that at the relevant time Mrs. Bryan acted in an aggressive manner towards Mr. Crawford. This is confirmed by Mr. James' own evidence when he stated *inter alia* that "***the lady was gearing up for something.***" According to him, Mrs. Bryan felt that because she paid her money she could behave as she pleased.

[47] Mr. Crawford must be complimented for the way how he handled the situation on the morning of July 31, 2003. He was only seeking to get Mrs. Bryan to comply with the hotel's policy that after 11.00 p.m. the guests are not to be disturbed.

[48] In all of the circumstances of this case the Employer has presented no evidence whatsoever to support its contention that Mr. Crawford's behaviour was either out of control or that his conduct at the relevant time was anything less than proper.

[49] This Court therefore finds that the dismissal of the Employee was unfair. He has mitigated his loss by seeking to obtain alternative employment soon after his dismissal. As a consequence, Mr. Crawford is entitled to be compensated for being unfairly dismissed. He has not exhibited any behaviour which would cause this Court to reduce his award. On the contrary Mr. Crawford is to be commended for his exemplary behaviour.

THE SECOND ISSUE

In the event that the circumstances of July 31, 2003 did not amount to misconduct which justified the Employer to dismiss the Employee. What is the measure of damages to which he is entitled?

[50] An employee who is held to be unfairly dismissed is entitled to certain awards under the established heads.

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

Under this heading the award represents one day's pay for each month of his term of employment. He worked for 69.5 months. His daily wage was \$91.72. His entitlement under this heading is \$91.72 x 69.5 or \$6,374.67.

(b) **Immediate Loss**

The Employee found employment in September 2004. He was unemployed for a period of just over one year. A period of six

months loss of earnings is appropriate to award him under this heading. I so award. This amounts to $(\$635 \times 52 \div 12) \times 6$ or \$16,509.99.

c) **Manner of Dismissal**

No award is made under this heading.

d) **Future Loss**

The Employee's salary is greater now than in his previous employment. As a consequence he is not entitled to an award under this heading.

OTHER AWARDS

Notice Pay

The Employee was paid every week. He is entitled to one week's pay in lieu of notice. This amounts to \$635.00.

[51] The Employer shall pay to the Employee the sum \$23,519.66 less any sum which may have been paid by the Employer to the Employee. The said sum shall be paid on or before June 30, 2009.

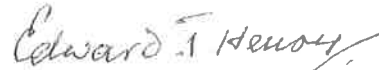
[52] There shall be no order as to costs.

Dated this 21st day of May, 2009

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

PHILIP A. PILGRIM
President

I agree

A handwritten signature in black ink, appearing to read 'Edward T. Henry', written over a horizontal line.

EDWARD T. HENRY
Member

I also agree

A handwritten signature in black ink, appearing to read 'Jessie F. Kentish', written over a horizontal line.

JESSIE F. KENTISH
Member

