

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 14 of 2008

BETWEEN:

ROLSTON MATTHIAS

Employee

and

WEST INDIES OIL COMPANY LIMITED Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Mrs. Glendina M. McKay

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Ms. E. Deniscia Thomas of St. Mary's Chambers

Attorney-at-Law for the Employee

Ms. Sharon Cort of Cort & Cort

Attorneys-at-Law for the Employer

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2009: June 25

July 29

September 01, 02

November 26

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**JUDGMENT**

**PILGRIM P:**

**The essential facts:**

[1] Mr. Rolston Matthias resides at Side Hill, St. John's in Antigua. He is 47 years of age.

[2] Mr. Matthias was formerly employed with West Indies Oil Company Limited (**afterwards called “the Employer”**) from the month of January 1991 until December 13, 1995. Throughout this period he worked as a terminal operator. According to Mr. Fernandez then Marketing Manager of West Indies Oil Company Limited the Employee’s ***“basic wages were \$654.40 per week less Statutory deductions.”***

**– see paragraph 5 of Mr. Fernandez’s Witness Statement filed on May 29, 2009.**

- [3] (i) The Employer is a company which purchases and stores petroleum products. These include diesel, gasoline, kerosene, jet fuel, and cooking gas. These products are sold by the Employer to different entities in Antigua & Barbuda.
- (ii) According to Mr. Webson, the Personnel Manager of the Employer a portion of the assets of West Indies Oil Company Limited was purchased by the Crown in or about 1975. A private individual owns 75% of the shares. The Crown owns the remaining 25% of the shares.

[4] Mr. Matthias stated that his job involved monitoring products in the tanks. He also managed the distribution from the tanks to the loading ramp. In his response to Ms. Cort, Mr. Matthias also informed the Court that his duties included (a) taking product samples; (b) keeping indirect contact with the sea island facility via the radio; (c) transferring of jet fuel from the Employer’s place of business to the

airport; (d) opening and closing valves; and (e) assisting at the liquid petroleum loading rack as was required.

[5] Further particulars of his duties were outlined by Mr. Joseph Fernandez for the Employer. He produced an undated document on behalf of the Employer entitled ***“Job Description”***. It contained the duties of a Terminal Operator. Mr. Fernandez stated that the duties listed in the document applied to Mr. Matthias. It was admitted and marked **“WIOC-16”**.

[6] In his evidence Mr. Matthias stated *inter alia* that he provided a Witness Statement dated June 19, 2009. He recognized it by his signature. It was filed on June 19, 2009. The Court admitted it into evidence.

[7] At paragraph 5 of his Witness Statement he stated as follows:

***“I remember the incident that the Employer used as the basis of my termination. It was on December 5, 1995. I was working the 4/12 shift. And at the end of my shift no one had come to replace me and I did not receive any authorization to continue to work so I did not work on.”***

[8] In his evidence before the Court in answer to Ms. Thomas, Mr. Matthias stated *inter alia* as follows:

***“I know Mr. Fernandez. He was the Marketing Manager in November 2005. One operator had worked overtime without authorization and since no one came to relieve him, he***

*continued to work. Mr. Fernandez told a group of us before I was dismissed that if he could not be contacted by the operator, I could use my discretion. If some operation was taking place and my relief did not arrive, then I could continue to work as two operators are needed. If no operation is taking place, only one operator would work on the 4:00 p.m. – 12:00 p.m. and the 12:00 p.m. to 8:00 a.m. shift.”*

- [9] In further answer to Ms. Thomas, Mr. Matthias stated *inter alia* as follows:

*“I knew Mr. Fernandez had told me that if no operation was taking place I could leave the workplace. I wished to exhaust all possibilities and try to get in contact with him. I asked the security on duty at the time to allow me to call Mr. Fernandez. He told me the phone was out of bounds to a terminal operator. I told him to call Mr. Fernandez. He told me it is not his job to do so. I left the compound and went home”.*

- [10] The Employer avers that it dismissed the Employee for leaving the compound on the night of December 05, 1995 without proper authorization and for other reasons. His letter of dismissal was dated December 08, 1995. It became effective from December 13, 1995.

- [11] The letter of dismissal was admitted as Exhibit “**WIOC11**”. It states as follows:

*“The West Indies Oil Company Limited  
(Incorporated in Antigua)  
P.O. Box 230*

*St. John's Antigua  
West Indies*

*December 8, 1995*

*Mr Rolston Matthias  
C/O Terminal Department  
The West Indies Oil Co Ltd  
Dear Mr Matthias:*

*On the 5<sup>th</sup> December, 1995 you were working as an Operator on the 4/12 shift, and according to our time keeping records, it was revealed that at midnight (your relief failed to show up for work) instead of waiting to hand over your duties and shift, you left your job without punching out your time card; and left the Company's compound without permission from your Supervisor/Department Head without properly being relieved, see:*

- (a) Industrial Agreement, Article 10 – Clause 3*
- (b) Employees Hand Book, Page 17 – Section 6*
- (c) Memorandum to all Operators dated 10/11/93*

*which states that as a shift worker, you must remain at your post or duty until properly relieved.*

*The Disciplinary Committee has reviewed your recent infraction relating to abandoning your job without proper authorization on the night of December 5, 1995.*

*The Committee took into consideration the following facts to arrive at the decision to terminate for cause:*

- (a) the serious nature of the offence*
- (b) your past performance on the job*

*Mr Rolston Matthias  
C/O Terminal Department  
Page 2*

- (c) your own admission (at a meeting on the 7<sup>th</sup> December, 1995 in the presence of the Company's representatives and the Union's shop stewards) that it was your practice to abandon the job once no one showed up to relieve you*

- (d) *your unrepentant attitude; since we failed to catch you then, why bother to make an issue now the Company spotted the infraction.*
- (e) *the importance of the job with regards to safety.*

*The Disciplinary Committee examined the seriousness of the infraction and feels that the violation outlined above is a blatant disregard of your responsible position and the Company's welfare and recommends that your relationship with the company be severed for cause with effect from the 13<sup>th</sup> December, 1995.*

*As a result of the above, any property belonging to WIOC including keys, tools, etc., that you might have in your possession should be returned to the Terminal Supervisor before the final settlement is made.*

*Very truly yours,*  
**THE WEST INDIES OIL COMPANY, LIMITED**

*Leo Webson*  
*Personnel Manager*

*/lb*

*Cc: Managing Director*  
*Financial Controller*  
*Operations Manager*  
*Operations Superintendent*  
*Terminal Supervisor*  
*Antigua Workers' Union*

- [12] After being dismissed Mr. Matthias informed the Court that he was unemployed for *“almost two years”*. During this period he obtained irregular employment painting and cutting grass. He wrote applications to Cable and Wireless and BBC. In addition he approached the entity which dealt with Airport Services. He worked in July/August 1997 at the Antigua Brewery as a brew house operator. In this capacity he earned a weekly wage of \$450.00.

- [13] In January 1998 he obtained a teaching position until 2007 when he stopped teaching. During this period of employment he earned a monthly salary of \$2,680.00.
- [14] He is currently employed in the construction sector. His duties involve *inter alia* the making of cupboards. He gave no evidence of his earnings.
- [15] In his Witness Statement the Employee contends that the Antigua Worker's Union represented him with respect to his dismissal by the Employer.
- [16] According to him ***"in about 2004 the Union told me that nothing was working out and they would have to send the matter on to the Industrial Court"***.
- [17] At paragraph 4 of his Witness Statement he states *inter alia* as follows:
- "In about 2006 or so after making numerous enquiries, I found out that the Union did not put in the case"***.

### **LEGAL PROCEEDINGS**

- [18] The Employee's Reference and his Employee's Memorandum were both filed on November 20, 2008. In that Memorandum he claims *inter alia* damages for unfair dismissal.

- [19] The Employer's Memorandum was filed on January 19, 2009. It denies that the Employee was unfairly dismissed. Counsel for the Employer asserts that *"The employee received payment of all monies lawfully due to him upon his dismissal totalling \$18,958.92"*.
- [20] The Employee filed his Witness Statement on June 19, 2009. Witness Statements for the Employer were filed by Mr. Ronald Barnes and Mr. Joseph Fernandez both on May 29, 2009. A Witness Statement of Mr. Leo Webson also for the Employer was filed on June 23, 2009.
- [21] The Employee gave evidence in support of his case. Messrs. Barnes, Fernandez and Webson gave evidence on behalf of the Employer.

### **THE ISSUES**

- [22] The issues for determination are as follows:
- (i) Was the filing of the Employee's Reference on November 20, 2008 barred by Section (7) of The Limitation Act No. 8 of 1997?
  - (ii) What was the reason for the Employer's dismissal of the Employee by the letter of December 08, 1995?
  - (iii) Whether, in all of the circumstances of this case the Employer acted reasonably in using the reason contained in the letter of dismissal as the ground for dismissal?

- (iv) If in all of the circumstances of this case the Employer did not act reasonably in its dismissal of the Employee, what is the measure of compensation that this Court should award him?

### **THE FIRST ISSUE**

**Was the filing of the Employee's Reference on November 20, 2008 barred by Section (7) of The Limitation Act No. 8 of 1997?**

[23] The Employee was dismissed by letter dated December 08, 1995. Nearly thirteen years later on November 20, 2008 for the first time he filed a Reference in the Industrial Court.

[24] On June 25, 2009 Ms. Cort Counsel for the Employer filed an Application supported by an Affidavit in essence to strike out the Employee's Reference.

[25] **Section (7) of The Limitation Act No. 8 of 1997** states as follows:

***"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued".***

[26] Ms. Cort submits that Section (7) of The Limitation Act, 1997 bars the Employee from commencing his action after six years. Some authorities were produced for the Court's guidance.

- [27] Ms. Thomas Counsel for the Employee submits that there is no specific period enshrined in the Labour Code which deals with a determination of this issue. According to her, proceedings are commenced when they are initiated before the Labour Commissioner. Such was done. No documents were produced in support of her submission.
- [28] In accordance with **Sections 4 (8) (b), 7 and 10 of The Industrial Court Act Cap. 214** of the Laws of Antigua & Barbuda I hold that such matters which are contained in these sections are not regulated by Section (7) of The Limitation Act, No. 8 of 1997. As a consequence I dismissed the Employer's application.
- [29] It is however unacceptable for whatever reason for an employee to commence legal proceedings in the Industrial Court so long after he has been dismissed. This places an unreasonable burden upon both parties.
- [30] It may very well be timely for Parliament to amend the relevant legislation so as to specifically circumscribe a period during which an employee who has been dismissed may be permitted to commence legal proceedings in the Industrial Court for unfair dismissal against an employer.

## THE SECOND ISSUE

What was the reason for the Employer's dismissal of the Employee by letter of December 08, 1995?

## THE LAW

- [31] In accordance with Section C 56 of the Labour Code an employee who completes a probationary period of employment is entitled to **“the right not to be unfairly dismissed by his employer”** without **“just cause”**.
- [32] Counsel for the Employee and the Employer in their Written Submissions state that Sections C 58 (1) (a) and (2) of the Labour Code are apt to consider a determination of the second issue. Those sections state as follows:

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

***(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".*

[33] Section 59 (1) (a) proscribes the nature and extent of the misconduct referred to in Section C 58 (1) (a) of the Labour Code.

[34] (i) Ms. Cort for the Employer placed before the Court different reasons which according to her cumulatively justified the Employer to dismiss the Employee. This was as submitted by her in accordance with the letter of dismissal dated December 08, 1995.

(ii) These reasons were (a) the Employee's late arrival at work on some occasions; (b) his uncertified illnesses; (c) his refusal to carry out certain management instructions; and (d) leaving the Employer's compound without permission.

**– See paragraphs 1 and 2 of Ms. Cort's Written Submissions filed herein on October 09, 2009.**

[35] Whilst the Employee in his Memorandum focused on the events of December 05, 1995 as the ground advanced by the Employer for his dismissal, other reasons were highlighted in his Witness Statement.

[36] Ms. Thomas for the Employee submits *inter alia* ***"that despite this statement made as to termination in the letter of termination, the***

*only reason for Mr. Matthias termination was that he left the compound at the end of his shift on the 5<sup>th</sup> December, 1995 without being properly relieved”. According to Ms. Thomas she submits “that this reason should be the focus of the Court’s determination as to whether or not the dismissal was unfair”.*

– See Ms. Thomas’ Written Submissions filed herein on October 09, 2009 at pages 2 and 3.

[37] What is the state of the evidence?

Mr. Ronald Barnes was the first witness to give evidence on behalf of the Employer. He resides at Weatherills Road, Crosbies in St. John’s. He was employed with the Employer for the period June 1969 to October 2007. He demitted office as Purchasing Superintendent.

[38] In December 1995 Mr. Barnes was employed as a Supervisor. On December 05, 1995 he worked the 8:00 a.m. – 4:00 p.m. duty shift. He left work about 4:00 p.m. During his shift the telephones were in proper working order. In his answer to Ms. Thomas during cross examination Mr. Barnes stated *inter alia* as follows:

***“There is one thing that he (Mr. Matthias) was fired for and that was for leaving the job without permission.”***

[39] Mr. Joseph Fernandez gave evidence for the Employer. He resides at No. 13 Crosbies in St. John’s. He was employed with the Employer since 1972. In 1995 he worked as its Marketing Manager. He is a

Chemical Engineer by profession. He assumed his present duties as the Employer's Chief Executive Officer from September 01, 2006.

[40] Since his employment with the Company in 1972 there was in existence an Employees Handbook. The Employer's Personnel Department issued this document to each employee upon assumption of employment. It is Mr. Fernandez's evidence that Mr. Matthias would have been issued with a copy of this document when he obtained employment with the Employer in 1991. The document entitled '**West Indies Oil Company Ltd. Employees Handbook**' was admitted into evidence as "**WIOC-17**".

[41] Mr. Fernandez gave evidence of his understanding of the provision for shift workers obligations as contained in the Employees Handbook. According to him, *"shift workers could not leave the job site without being properly relieved by the incoming shift. In cases where someone has to leave the workplace in cases of illness he would be required to contact the Supervisor or someone in management"*.

[42] If nothing is taking place at the terminal and his relief did not come into work for whatever reason it would have been incumbent on that employee to contact a management officer to obtain permission to leave the job.

[43] (i) If the employee could not contact a management officer he would have been required to remain on the job site.

- (ii) Mr. Fernandez was of the view that the provisions contained at Section (2) sub-section (6) at page 17 of the Employees Handbook were in operation during the entire period of Mr. Matthias' employment with the Company. They are still in operation today.

[44] Mr. Fernandez further testified that on the night of December 05, 1995 and thereafter, ***“Mr. Matthias had access to a working telephone on the property”***.

[45] He further stated *inter alia* as follows:

***“I would never have told Mr. Matthias that if no operation is taking place that he could go home. It is untrue that if the employee does not contact someone that he could leave”***.

[46] Mr. Fernandez testified that he ***“never gave any instruction to any employees that if I could not be contacted they could leave the premises of West Indies Oil Company Limited”***.

[47] According to Mr. Fernandez ***“management would need to know if the place is unmanned. This is a definite policy. This would be contrary to a memorandum which I issued to all Terminal Operators”***.

[48] (i) The memorandum was circulated by Mr. Fernandez as its Terminal/Marketing Manager to all Terminal Operators on November 10, 1993. It stated *inter alia* as follows:

***“In the event that an operator calls in sick and is therefore unable to report to work as scheduled, the operator on duty must notify one of the following supervisory people immediately”.***

The names of Messrs. R. Barnes, W. Solomon and J Fernandez, their positions and telephone numbers were provided in the Memorandum.

(ii) The memorandum continued as follows:

***“The Supervisor contacted will then determine whether or not the operator on duty may leave for home. In the event that none of the above can be contacted, the operator on duty must remain on the job until properly relieved”.***

The memorandum was admitted into evidence as ***“WIOC-14”***

(iii) In addition to its circulation the memorandum was placed in a prominent position on the Employer’s Notice Board. It is Mr. Fernandez’s evidence that in all probability the Employee had knowledge of it.

[49] In answer to the Court Mr. Fernandez stated *inter alia* as follows:

***“The company discussed with Mr. Matthias the gravity of the offence and that it was cause for dismissal”.***

[50] Mr. Leo Webson gave evidence for the Employer. He resides at Carlisle in the parish of St. Mary’s. He has been employed with the Employer from February 27, 1968. On September 1, 1976 he became the Employer’s Industrial Relations Officer. On August 20, 1983 he was appointed as the Employer’s Personnel and Administrative

Officer. He obtained a promotion of Personnel Manager from July 20, 1992, a position which he still occupies.

[51] Mr. Webson was aware of the existence of an Employees Handbook at the Employer's place of business. When he joined the Company in 1976 it "*came into existence*". Changes were made to it in 1975, 1976, 1981, 1982 and 1984 in accordance with the Labour Code. A maternity leave section was added to the document in 1988. It was Mr. Webson's evidence that the Employees Handbook remained the same since 1984 or 1988.

[52] According to Mr. Webson when Mr. Matthias was hired in 1991 he received a copy of the Employees Handbook.

[53] Mr. Webson presented a bundle of documents to the Court. They were marked "**WIOC-2 to WIOC-13**" respectively and "**WIOC-15**".

- [54] (i) In Mr. Webson's evidence he outlined the procedure in a circumstance where a shift worker does not arrive at the Employer's compound to relieve another shift worker from his duties.
- (ii) Firstly, the employee who requires relief is duty-bound to telephone the Superintendent. If for some reason he is not available, the employee is then required to telephone the Manager and subsequently the Terminal Foreman.
- (iii) Secondly, if the employee is unable to make contact with either of the three parties, he is required to remain on the Employer's

premises. Under no circumstances is the employee allowed to leave his place of employment unless he is granted permission to do so.

[55] In his answer to Ms. Thomas Mr. Webson stated *inter alia* as follows:

***“There is a Disciplinary Code within the Employees Handbook. Based on the Disciplinary Code Mr. Matthias could not have been dismissed for coming to work late”.***

Mr. Webson referred the Court to Sections 19 and 20 of the Disciplinary Code.

[56] Mr. Webson further stated *inter alia* as follows:

***“His taking thirteen (13) working days being sick or absent is not in breach of the Industrial Agreement which is binding between the Employee and the Employer”.***

[57] In further answer to Ms. Thomas, Mr. Webson gave the following evidence:

***“I see the termination letter. I am the architect of it. I have given five (5) reasons for his dismissal. Lateness was not a factor in Mr. Matthias dismissal. Absence from work was not a reason for the dismissal. Refusal to carry out orders was not a reason for the dismissal”.***

[58] Mr. Webson stated that if Mr. Matthias leaves the compound without obtaining permission, this action raises safety issues. Such may include (a) spillage; (b) leaking; or (c) the occurrence of a fire.

[59] In answer to Ms. Thomas Mr. Webson gave in his opinion what was the main reason which caused the Employer to dismiss the Employee. He stated *inter alia* as follows:

***“(i) The main reason why Mr. Matthias was dismissed was because he left the compound without permission on the night of December 05,1995.***

***(ii) Apart from the event of December 05, 1995, his past performance on the job was a reason for his dismissal including sickness and absences”.***

[60] In further answer to Ms. Thomas, Mr. Webson gave the following evidence:

***“If leaving the compound without permission was a dismissible offence, then it should have been included in the handbook. With this absence in the Employees Handbook I do not agree that summary dismissal would not apply”.***

[61] In answer to Ms. Cort Mr. Webson stated *inter alia* as follows:

***“I see the bottom of the Employees Handbook which states that disciplinary measures will not only be limited to those offences listed in the Employees Handbook. The Employer could consider other serious offences which are not included in the Employees Handbook”.***

[62] Mr. Webson in response to the Court stated *inter alia* as follows:

*“The sole reason for the dismissal was Mr. Matthias’ infraction when he left West Indies Oil Company Limited on December 05, 1995 without obtaining permission from anyone. This was in breach of the provision at page 17 of the Employees Handbook”.*

- [63] (i) In her Written Submissions Ms. Cort for the Employee stated at paragraph 12 *inter alia* as follows:

*“In the present case, the reasons for the dismissal of the Employee are stated in the termination letter (WIOC-11) dated 8<sup>th</sup> December, 1995. The letter primarily refers to the incident of 5<sup>th</sup> December, 1995 which the Employee’s Disciplinary Committee investigated”.*

- (ii) Ms. Cort’s submission in this regard is in consonance with that of Ms. Thomas’ view as expressed at paragraph 36 of the judgment.

- [64] I agree with both Counsel that the letter of dismissal clearly articulates that in essence the reason for the Employee’s dismissal centred primarily upon the events of December 05, 1995.

- [65] (i) The clear evidence of all of the three witnesses who gave evidence for the Employer was to the effect that the sole reason for the Employee’s dismissal was due to his departure from the Employer’s place of business on the night of December 05, 1995 without having been relieved by another shift worker.
- (ii) I have no great difficulty in arriving at this conclusion.

### **THE THIRD ISSUE**

**Whether in all of the circumstances of this case the Employer acted reasonably in the letter of dismissal as the ground for dismissal?**

[66] The Employer states in its letter of dismissal that the basis for its decision to dismiss the Employee is well founded in accordance with:

- (a) Article 10 - clause 3 of the Industrial Agreement between the Employer and the Antigua Workers Union dated May 01, 1992 effective until August 31, 1996 – Exhibit “**WIOC – 10**”
- (b) Sub-section 6 on page 17 of the Employees Handbook - Exhibit “**WIOC- 17**”
- (c) Memorandum to all Terminal Operators dated November 10, 1993. Exhibit – “**WIOC-14**”

[67] Messrs. Fernandez and Webson in their testimony both agreed that the provision which is contained at sub-section 6 on page 17 of the Employees Handbook was utilized as a basis for dismissing the Employee.

[68] The relevant portion of sub-section 6 on page 17 of the Employees Handbook states as follows:

**“Shift Workers**

***Shift operations have to be carried on from relief to relief in an unbroken chain, therefore, punctuality and regularity are an important part of the Shift Worker’s responsibility.***

.....  
***A shift worker who is scheduled for relief on completion of his***

*shift; but who is not relieved from duty on time, will be required to remain on duty until such time as he is relieved or allowed to leave by his Supervisor”.*

[69] Mr. Matthias in answer to Ms. Cort stated *inter alia* as follows:

*“If no relief came, I would call Mr. Fernandez and he would tell me to leave or stay. I would just not get up and leave. I would have to get the permission of a Supervisor or someone above me to go home”.*

- [70] (i) On February 10, 1995 Mr. Matthias left his substantive post as a Terminal Operator and proceeded off the compound without obtaining the prior approval of his Supervisor.
- (ii) By letter dated February 14, 1995 from the Employer to the Employee the Employer warned him, *“that should there be a reoccurrence of (this act or a similar one) disciplinary measures will be taken against (him).”*

[71] I do not believe Mr. Matthias’ evidence which is to the effect that he received a **cart blanche** or any permission from Mr. Fernandez that *“if no operation was taking place (he) could leave the workplace”* if no worker came to relieve him. My reasons for so holding are as follows:

[72] Firstly, Mr. Matthias knew or ought to have known that it was absolutely wrong for him to leave the compound without obtaining the prior permission of his Supervisor if he requires to be relieved from his duty. The Employer’s letter of warning to him dated February 14,

1995 was clear with regard to an understanding of this matter. This is so regardless of whether or not he attempted to telephone Mr. Fernandez or any other senior staff member.

- [73] Secondly, if Mr. Matthias is to be believed that Mr. Fernandez informed him that *“if no operation was taking place (he) could leave the workplace”*, of what use is his evidence which states *inter alia* as follows:

*“I asked the security on duty to call Mr. Fernandez”.*

If the security guard did allow Mr. Matthias to speak with Mr. Fernandez and Mr. Fernandez informed him that as no relief has arrived he would be required to stay at his post, as a consequence, Mr. Matthias’ evidence in this regard would be absolutely incorrect.

- [74] Thirdly, Mr. Matthias well knew that he was required to seek and obtain Mr. Fernandez’s permission in a circumstance where no one came to relieve him. He admitted this in answer to Ms. Cort at paragraph [69] of this judgment.

- [75] In circumstances where Mr. Matthias was previously warned for leaving the premises without obtaining permission from an authoritative figure, he was under an increasing obligation to seek to obtain an audience with a member of the management team if no relief came to work. On December 05, 1995 his duty was to stay at work in accordance with the provisions of Exhibit **“WIOC-14.”**

[76] In the circumstances of this case I hold that Mr. Matthias acted recklessly, displayed irresponsible behaviour, was careless and showed a disregard for the Employer's business on the night of December 05, 1995.

- [77] (i) If there is a breach of Section (1) of sub-section (6) of the Employees Handbook the Disciplinary Code which is located to the rear of the Handbook provides the course of discipline which the Employer is mandated to follow.
- (ii) Paragraph 16 of the Disciplinary Code clearly outlines to the Employer the steps which it is required to follow if there is a breach of sub-section 6 at page 17 of the Employees Handbook. Under the heading "*Type of Offences*" paragraph 16 states as follows:

**"Absent from designated job site without permission.**

- |                         |          |                   |
|-------------------------|----------|-------------------|
| <b>(First offence)</b>  | <b>-</b> | <b>Warning</b>    |
| <b>(Second offence)</b> | <b>-</b> | <b>Suspension</b> |
| <b>(Third offence)</b>  | <b>-</b> | <b>Suspension</b> |
| <b>(Fourth offence)</b> | <b>-</b> | <b>Dismissed"</b> |

- [78] (i) The Disciplinary Code of the Employees Handbook makes provision for certain offences to be visited with summary dismissal. These include (a) smoking or having open fires within the Employer's compound; (b) theft; (c) selling drugs; (d) having an unlicensed firearm; (e) punching in or out another worker's time card; (f) immoral conduct; (g) conviction in the High Court for any major offence.

- (ii) It is very clear that the Disciplinary Code of the Employees Handbook does not contain a provision for summary dismissal of an employee who leaves the Employer's compound without permission.

[79] Did the Employer act in a manner which was consistent with subsection 6 and the relevant provision of the Disciplinary Code?

[80] The Employer produced "**WIOC-15**" to show that the Employee was first absent from the job site on February 10, 1995 without permission. For this first offence he was duly warned by the Employer by letter dated February 14, 1995.

- [81] (i) The evidence of the second occasion on which Mr. Matthias left the Employer's compound without permission and what action the Employer proscribed as a result is contained in the Witness Statement of Mr. Leo Webson.
- (ii) At paragraph 31 of Mr. Webson's Witness Statement he states *inter alia* as follows:

*"However, in March 1995, the Employee left the Employer's compound during his shift without permission and without giving any satisfactory reason for so doing. I wrote to the Employee on 3<sup>rd</sup> March, 1995 informing him that he was temporarily suspended pending investigation of the incident".*

- (iii) At paragraph 22 Mr. Webson states as follows:

***“On 7<sup>th</sup> March, 1995, I wrote to the Employee detailing the outcome of the investigation into the incident and advising that he was suspended until 21<sup>st</sup> April, 1995.”***

- (iv) At paragraph 23 of Mr. Webson’s Witness Statement he gave his evidence *inter alia* as follows:

***“Mr. Palmer (the then Managing Director of the Employer) indicated in his letter that the Disciplinary Committee had met to discuss the Employee’s suspension and after much consultation and deliberation had agreed to withdraw the suspension and allow the Employee to return to work on 16<sup>th</sup> March, 1995. Mr. Palmer also indicated that the Employee’s performances will continue to be evaluated”.***

- [82] The Employer presented no documented evidence to the Court of the letters referred to by Mr. Webson dated March 03, 1995 or March 07, 1995. In any event it is the Employer’s evidence that it ***“had agreed to withdraw the suspension.”*** The effect of the Employer’s withdrawal of this suspension means that it cannot be used to state that the Employee committed a second offence in accordance with the Disciplinary Code.

- [83] (i) The third occasion on which the Employer avers that Mr. Matthias left its place of business is outlined at paragraph 25 of Mr. Webson’s Witness Statement. The relevant portion reads as follows:

***“On 11<sup>th</sup> May, 1995 I wrote to . . . . the Antigua Workers Union setting out the Employer’s concerns . . . of the Employee . . . . In the letter, I detailed the various incidences of the Employee leaving the Employer’s premises without permission, . . . . I also indicated that unless the Employee improved his unsatisfactory performance at work, stronger disciplinary measures would be taken against him”.***

- (ii) I read the letter of May 11, 1995. It specifically refers to one occasion when Mr. Matthias left the Employer’s place of business without obtaining any authorization. This took place on March 20, 1995 some four days after his return to work on March 16, 1995.
- (iii) No evidence was led by the Employer which shows that it disciplined the Employee with respect to the incident of March 20, 1995. In his letter to the Trade Union dated May 11, 1995 Mr. Webson stated *inter alia* as follows:

***“[W]e look forward for an immediate and sustained improvement in his overall performance at work, failing which stronger disciplinary measures will be taken against him”.***

- [84] (i) Ms. Thomas in her Written Submissions filed herein on October 09, 2009 referred to the Employees Handbook, and submitted that paragraph 16 of the Disciplinary Code applies to the facts of this case.

- (ii) In the alternative Ms. Thomas submits that if the Court does not apply paragraph 16 of the Disciplinary Code, then *“the offence is not one for which summary dismissal can apply . . . .”* Ms. Thomas cited **Frances Lewis and Courts (Antigua & Barbuda) Limited Reference No. 13 of 1997** and **R.A. Pringle and Lucas Industrial Equipment Limited [1975] IRLR 266**. For the reasons stated at paragraph [77] of this judgment the cases of **Frances Lewis** and **R. A. Pringle** do not strictly assist the Court in a determination of the issue except as to quantum.

[85] Ms. Cort for the Employee in her Written Submissions filed herein on October 09, 2009 states *inter alia* at paragraph 10 as follows:

*“The evidence is that the Employee did not follow the procedure laid out at page 17 of the Employee Handbook under the heading “Shift Workers” . . . . This was also a breach of Article 10 (3) (c) of the Collective Agreement . . . .”*

[86] I have examined **Article 10 (3) (c)** of the Industrial Agreement – **“WIOC – 10”**. This Article must be read in conjunction with Article 22 which deals with discipline. The relevant part of Article 22 (1) (a) reads as follows:

**“Discipline**

- (i) *The Company reserves the right to reprimand, suspend, or dismiss an employee for just cause. In pursuit of and in exercising this right, the parties agree:*

*(a) That when an employee is alleged to have committed a breach of the Company's rules and regulations, such as to warrant serious disciplinary action, then the employee may be suspended from work without pay pending investigation .....*"

[87] The Employer in its treatment of Mr. Matthias leaving the compound invoked the provisions of Section (2), sub-section (6) on page 17 and paragraph 16 of the Disciplinary Code. These are both contained in the Employees Handbook. In these circumstances and in any event the provisions of Articles 10 (3) (c) and 22 of the Industrial Agreement have no application to the facts before the Court.

[88] Clear terms were agreed by the Employer and the Employees including Mr. Matthias of the various types of offences for which specific disciplinary action would apply. These terms were clearly published in the Employees Handbook. I find that the Employees Handbook was given by the Employer to the Employee when he commenced employment with the Employer from January 1991.

[89] In accordance with the terms which are contained in the Employees Handbook the Employer was obliged to apply them whenever it was appropriate to do so.

- [90] (i) The Employer commenced the application of the terms at paragraph 16 of the Disciplinary Code when it correctly issued the letter of warning to him dated February 14, 1995.
- (ii) For the committal of the second offence the Employer acted consistently with paragraph 16 of the Disciplinary Code when it suspended the Employee. This action is contained in its letters to him dated March 03 and March 07, 1995. The Employer however withdrew this suspension.
- (iii) For the third offence which occurred on March 20, 1995 the Employer was well aware of its prior actions. However it chose not to invoke the provisions of paragraph 16 of the Disciplinary Code which afforded it the right to suspend the Employee. Instead, it required from him through the Trade Union ***“an immediate and sustained improvement in his overall performance at work . . . . failing which stronger disciplinary measures will be taken against him”***.
- (iv) For his breach of sub-section (6) of the Employees Handbook the Employee was dismissed for leaving the job site on December 05, 1995.

[91] The Employer did not follow its own procedure for dealing with a breach of sub-section (6) at page 17 of the Employees Handbook. It should not have withdrawn the second suspension if it intended to rely upon it at a later date. In addition, the Employer was obligated according to its own rules at paragraph 16 of the Disciplinary Code to suspend the Employee for the third offence, before it dismissed him

for a breach of sub-section (6) ostensibly on the fourth occasion. It failed to do so.

[92] (i) In the circumstances of this case I hold that the Employer did not act reasonably in using the misconduct outlined in the letter of dismissal as the ground for summary dismissal. Mr. Matthias was unfairly dismissed. I have derived much assistance for my finding in the reading of the **English Industrial Tribunal** decision of **G Wells and E & A West Limited [1975] IRLR 269**.

(ii) In **Wells** the head note reads *inter alia* as follows:

*“The respondents’ agreed dismissals procedure provided that failure to carry out reasonable requests to do work or conduct causing disruption of the company’s business would result in a warning followed by suspension. In the present case, although the applicant had been warned about his conduct three times, he had not been suspended. His persistence in committing the offences could not be held to override the requirements of the respondents’ procedure that he be suspended before being dismissed”.*

[93] (i) **Mr. L. Irving Chairman of the Tribunal** stated *inter alia* as follows at page 271:

*“The next thing we have to consider is whether, in all of the circumstances and having regard to the equity of the case, the respondents acted reasonably in using that*

*misconduct as the grounds for dismissal. We have had before us a document which represents the terms which have been agreed with the union by the respondents about dismissal and the Tribunal takes the view that if terms relating to dismissals are agreed with the unions and they are communicated to the work force one cannot readily regard their unilateral abrogation as being reasonable. There are two classes of acts or omissions which can lead to dismissal”.*

- (ii) **Mr. L. Irving Chairman** also held at page 271 *inter alia* as follows:

*“But in the same document we find that failure to carry out reasonable requests to do work would be cited by warning followed by suspension, or conduct causing disruption of the company’s business would be visited by a warning followed by suspension. Mr. Clough has asked us to accept the view that three warnings which Mr. Wells in our opinion undoubtedly had, override this provision and that dismissal for persistence in these offences should follow. This is a view which the Tribunal simply cannot accept, the Procedure is perfectly clear; it is laid down for these types of misconduct, warning should be followed by suspension. This was certainly not done. There was no suspension of Mr. Wells”.*

(iii) The Court held in **Wells** at page 271 that

*“the respondents did not act reasonably in using the misconduct as the grounds for dismissal”.*

Mr. Wells was held to be unfairly dismissed.

#### **THE FOURTH ISSUE**

**If in all of the circumstances of this case the Employer did not act reasonably in its dismissal of the Employee what is the measure of compensation that this Court should award him?**

- [94] (i) Upon Mr. Matthias' termination he obtained certain payments from the Employer. The Employer paid him \$18,958.92. The sum of \$15,515.90 was paid to him as thrift fund contributions.
- (ii) According to a document dated January 12, 1996 (Exhibit “WIOC-2”) from the Employer and signed by Mr. Matthias he accepted \$3,443.02 *“as final termination settlement thus releasing West Indies Oil Company Limited from any claims or liabilities arising out of or connected with the above mentioned settlement”*. The date of May 10, 1996 appears at the right hand lower section of the document.
- (iii) The sum of \$3,443.02 comprised \$434.52 for outstanding sick leave, \$2,554.78 for outstanding vacation days and \$453.72 for vacation bonus.

## **THE AWARD**

[95] 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**

The award under this heading represents one day's pay for each month of his period of employment. The evidence shows that he worked for fifty-nine (59) months. He earned a daily wage of \$93.23 ( $\$654.40 \times 52 \div 365$ ). He is entitled to  $\$93.23 \times 59$  or \$5,500.57.

(b) **Immediate Loss**

The Employee was unemployed for "*almost two years*". A period of sixteen (16) weeks would suffice to award him under this heading. This amounts to  $\$654.40 \times 16$  or \$10,470.40.

(c) **Manner of Dismissal**

No award is made under this heading.

(d) **Future Loss**

No evidence was led to support an award under this heading.

## **The Employee's Conduct**

[96] By virtue of the Employee's conduct he contributed significantly towards the act of his Employer to dismiss him. Ms. Cort for the Employer submits that the Court should be "*urged to consider the contributory conduct of the Employee in a reduction of any award*

*(which it may be inclined to grant) the Employee*". I fully agree with this submission. I hasten to remind Ms. Thomas, Counsel for the Employee that in **R. A. Pringle** (op cit) which was cited by her, the Court did *"reduce the assessment of the applicant's loss by about 90%."*

- See page 260 of the judgment.

[97] In **G Wells** (op cit) **Chairman L Irving** stated at page 272 *inter alia* as follows:

*"If a man, knowing that it is going to embarrass his employers; fails to work when he is asked to do so and has promised to do so;. . . . and goes home without taking the steps he could have done, he must be expected to have something visited upon him for this attitude and behaviour. We think that Mr. Wells was 75% responsible for his dismissal. . . ."*

[98] (i) In **J A Cooper and British Steel Corporation** [1975] IRLR 308 an employee in the words of Mr. Justice Phillips *"had a good record. He had never had any complaint made against him previously"*.

– See page 308

(ii) In **Mr. Justice Phillips** judgment he stated *inter alia* at page 308 that the male employee had

*"been guilty of a piece of brazen disobedience, but that..... having regard to his long service and good record, dismissal was not justified"*.

The High Court substituted the Industrial Tribunal's reduction of 95% to 70%.

[99] In **Street and Wright Insulations Limited (1973) 8 Industrial Tribunal Reports page 5**; an employee was employed as an industrial engineer for eight years. On one occasion the chargehand informed him that as no more work was required to be done, the employee could leave the work site eighteen (18) minutes before the time he should have stopped work. He was summarily dismissed for his act. The Industrial Tribunal held his dismissal to be unfair but reduced his award by 80%. The National Industrial Relations Court upheld the Industrial Tribunal's reduction of 80%.

[100] In **Franklin Francis and St. John's Development Corporation Reference No. 12 of 2007**, this Court reduced an employee's award by 75%.

[101] Each case is to be determined according to its own merits. Taking into consideration all of the facts of this case inclusive of (a) the Employee's conduct prior to dismissal; (b) his conduct post dismissal; and (c) his evidence before this Court, I hold that the Employee's award should be reduced by 95%.

[102] With the necessary appropriate modifications to Mr. Justice Warner's judgment in **Berger v Raymond Sun Ltd. [1984] 1 WLR 625 at page 634**, I state as follows:

*"I hope that (Ms. Cort will acquit me of discourtesy if I (did) not deal at any length with some additional points that (she) made .... It did not seem to me that those points could affect the result"* of the major issues which were required to be determined in this case.

[103] The sum to which the Employee is entitled is \$15,970.57 less \$15,172.04 or \$798.53. The Employer shall pay to the Employee **\$798.53** on or before **December 23, 2009**. There shall be no order as to costs.

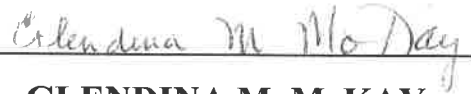
**Dated the 26<sup>th</sup> day of November, 2009.**



**PHILIP A. PILGRIM**

**President**

**I agree**



**GLENDINA M. McKAY**

**Member**

**I agree**



**DR. HAYDEN THOMAS**

**Member**

