

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 17 OF 2007

BETWEEN:

CRAIG JOSEPH

Employee

and

DIAMONDS INTERNATIONAL

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Edward T. Henry

Member

The Hon. Genevieve L. I. Benjamin

Member

Appearances:

Mr. Cosbert Cumberbatch –

Attorney-at-Law for the Employee

Mrs. Raquel A. Walsh Silston –

Simon Rogers Murdoch –

Attorneys-at-Law for the Employer

2009: April 21 and 22

July 30

JUDGMENT

PILGRIM P.:

Some essential facts

- [1] Mr. Joseph resides at No. 06 Potters Development in St. Georges in Antigua and Barbuda. He is 36 years of age.

- [2] Diamonds International is a privately owned business. It is registered under the Companies Act of Antigua & Barbuda. It is engaged in the business of selling jewellery, watches and similar items to locals and visitors. It operates a branch of its business at Heritage Quay, St. John's in Antigua & Barbuda.
- [3] The Employee was employed with Diamonds International from January 03, 2000. He worked as a sales representative. His duties consisted of selling jewellery at the Employer's main store at Heritage Quay in St. John's.
- [4] The Employee was paid at the rate of \$9.00 per hour. He was also paid for any time which he worked beyond the basic hours which he worked. In addition he obtained commission payments as a result of sales made by him. No evidence was produced which showed the average monthly sum which he was paid. His basic salary was \$1,440.00. He claims that he worked for a net monthly sum of \$3,200.00.
- [5] Apart from his basic salary and other overtime payment, the Employer introduced an incentive to boost sales. There was in existence a daily incentive bonus. If any employee started and completed five sales on any day when he worked, that employee was entitled to a payment of US\$75.00.
- [6] It is the payment of this incentive bonus which created some disharmony between the two parties.

- [7] On April 06, 2006 the Employee claimed credit for the sale of one Sandals necklace. This sale along with other sales would have given him five sales for that day. Consequently, he was paid the bonus of US\$75.00. This sale was disputed by the Employer. The Employer's position was that this particular sale was in fact made by another employee.
- [8] The Employer was of the view that the Employee's action portrayed a sense of "*dishonesty in receiving the daily bonus for which (he) did not work....*" His "**honesty and integrity**" was seriously questioned. As a consequence the Employer by its letter of April 25, 2006 dismissed the Employee "*with immediate effect.*" - See the letter of dismissal which was admitted as "**D I-I.**"

LEGAL PROCEEDINGS:

- [9] The Employee was dissatisfied with his dismissal. He caused a Reference and his Employee's Memorandum to be filed on December 21, 2007. In the Employee's Memorandum he claims that he was unfairly dismissed.
- [10] The Employer caused its Employer's Memorandum to be filed on February 04, 2008. It avers that the Employee was correctly dismissed. He is not entitled to any awards.

[11] The Employee caused his Witness Statement to be filed on April 17, 2009. On April 20, 2009 Ms. Eileen Bernard and Mr. Ido Levy filed Witness Statements in support of the Employer.

[12] This matter was heard on April 21 & 22, 2009. Mr. Joseph gave evidence. Ms. Bernard and Mr. Levy also gave evidence.

THE ISSUES:

[13] The matters which this Court is called upon to determine are as follows:

- (i) **Do the facts justify a finding that on April 06, 2006 the Employee claimed credit for the sale of one Sandals necklace which sale should have been credited to another employee?**
- (ii) **If the facts do merit a finding that the Employee's claim of a credit of one Sandals necklace resulted in a wrongful payment of the US\$75.00 daily incentive bonus to him, did his action constitute misconduct which justified the Employer to summarily dismiss him?**
- (iii) **If the facts did not justify the Employer to summarily dismiss the Employee, what is the measure of damages to which he may be entitled?**

EMPLOYEE'S WRITTEN SUBMISSIONS

[14] Mr. Cosbert Cumberbatch, Attorney-at-Law for the Employee made a number of Written Submissions. They were filed on June 15, 2009.

The relevant submissions are as follows:

- (i) Summary dismissal is reserved for the most serious offences. He cited **Laws v London Chronicle Ltd [1959] 1 WLR 698**.
- (ii) Such conduct may be found in just one action committed by an employee. – **Blyth v The Scottish Liberal Club [1983] 1RLR 245**
- (iii) Counsel also cited Sections C 60 (2) and C 61 of the Antigua & Barbuda Labour Code. There are with respect of no relevance. I suspect that he refers to the previous Labour Code. The relevant Sections of the Revised 2006 Labour Code are C 58 (i) (a) and (2) and C 59 (1) (a)
- (iv) Summary dismissal was unfair in the circumstances of this case.

EMPLOYER'S WRITTEN SUBMISSIONS

[15] Mrs. Racquel A. Walsh-Silston of Simon Rogers Murdoch, Attorneys-at-Law for the Employer made some Written Submissions. They

were filed on June 17, 2009. The pertinent submissions are as follows:

- (i) Counsel cited **Eural Baptiste v Bank of Nova Scotia Reference No. 25 of 2005**, a decision of this Court to articulate the approach of the Court in matters of summary dismissal.
- (ii) Counsel also cited **British Leyland (UK) Ltd v Swift [1981] 1RLR 91**, to state the test which the Court should utilize to determine if the dismissal was fair or unfair.
- (iii) The Employee having breached the trust and confidence which the Employer placed in him, it was right for the Employer to summarily dismiss him.

THE FIRST ISSUE

Do the facts justify a finding that on April 06, 2006 the Employee claimed credit for the sale of one Sandals necklace which sale should have been credited to another employee?

THE LAW

[16] 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 employee without just

cause.”

C 58 (i) (a) and (2) of the Labour Code reads 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.”

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);

[17] It is only in very strong and exceptional cases that a summary dismissal of an employee is justified. The test to be applied to determine whether or not a summary dismissal is warranted depends on the circumstances of the case. Such circumstances would include the nature of the business and the position held by the employee.

[18] In Smith & Wood’s book entitled **“Employment Law, Ninth edition, authored by Ian Smith and Gareth Thomas, Oxford University Press, London 2008** the learned authors state at **page 431** *inter alia* as follows:

“....every case must be viewed on its own facts to determine whether the conduct in question was grave enough, and the question is not to be

solved by searching for absolute rules covering each particular context (with the result that decided cases may be of little or no assistance).”

[19] No fixed rule of law therefore exists which defines the degree of misconduct that will justify summary dismissal.

[20] There exists between the Employer and the Employee a fiduciary relationship of trust and confidence. In **Neary v Dean of Westminster** [1999] 1.R.L.R. 288 Lord Jauncy explained this duty at **page 290 paragraph [18]** in the following manner.

“It has long been recognised that there exists between master and servant a fiduciary relationship of trust and confidence.”

[21] In Neary’s case (op cit) Lord Jauncy also stated certain matters which the Court should consider to determine the seriousness of the employee’s conduct. At **page 290 paragraph [19]** he stated *inter alia* as follows:

“The character of the institutional employer; the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must be all considered in determining the extent of the duty and seriousness of any breach thereof.”

[22] In Neary (op cit) Lord Jauncy at **page 291 Letter 22** described the nature of the misconduct which would undermine the relationship of

trust and confidence sufficient to justify the instant dismissal of the employee. Lord Jauncy stated *inter alia* as follows:

“[C]onduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”

- [23] ***Berridge, J.A in Cable & Wireless Ltd v Hill & Other (1982) 30 W I R 120*** commented upon the burden and the standard of proof which are required to be met in a case of this nature. At page 129 of the judgment, **Berridge J.A.** stated *inter alia* as follows:

“...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.”

- [24] In his evidence Mr. Joseph stated that the US\$75.00 incentive scheme became effective sometime in or about March 2005. In his evidence he stated *inter alia* as follows:

“The salesperson had to complete five (5) sales in order to qualify for the bonus.

A split sale is a situation where two sales persons

are engaged in a sale and because it is commission based, the commission is split evenly between the two persons. In this split sale situation both persons are said to have made the sale. If there is one split sale and four (4) whole sales then no one is entitled to the US\$75.00.”

[25] The Employee also indicated that on April 06, 2007 he was involved in a transaction with a female employee with respect to the sale of a Sandals necklace. It was valued at US\$39.00.

[26] Mr. Joseph continued his evidence as follows:

“[The female employee] started the sale of the necklace with the customer. The customer walked off and left the store. I was under the impression that the customer wanted to make the purchase. I called the customer back. I took the necklace from [the female employee]. I placed it around the customer’s neck. I engaged the customer in a sales pitch trying to close the sale... The customer asked me what is my name. I wrote it on a card. I gave it to her.”

[27] *“Sometime after I was in the midst of another sale when [the female employee] informed me that the customer had returned. I acknowledged the customer. I let her know that I will be with her shortly. I asked [the female employee] to go ahead and assist the lady. [The female employee] came and showed me the receipt with my name on it. This means that I had made the sale and that the*

commission would be paid to me. This was the second sale for me for that day. I recorded this in my little book.”

[28] *“Management put a system in place that a salesperson who has the bigger impact upon the customer should be awarded the full sale. There was no dispute with respect to the April 06, 2006 sale.”*

[29] In answer to Counsel for the Employer, Mr. Joseph stated *inter alia* as follows :

“A split sale is one which involves two persons. [The female employee] started the sale with the customer. In light of my definition of what a split sale is, yes this sale of 27598 could be considered a split sale. However, the two sales persons have discretion if the commission is going to be small. The two salespersons can decide who takes the sale. This was the policy of the company. I got no instructions from management but it is a policy I met when I started to work with the company. As far as I am aware management had no objections to it.”

[30] Eileen Bernard gave evidence for the Employer. She resides at Potters Village in Antigua. She has been employed with the Employer since August 1998. On April 06, 2006 she was employed as a supervisor. It was not a busy day. She described what is a split sale. She stated *inter alia* as follows:

“A split sale takes place when two salespersons are involved in a sale. So long as the sale is closed by the two salespersons

it automatically becomes a split sale. Where I see “Sold By,” there should be two numbers in the “Sold By” section. I have had cases where I have noticed split sales. It has happened to me.”

[31] Ms. Bernard described the company’s bonus policy. She stated *inter alia* as follows:

“I know the incentive bonus policy with regard to the payment of US\$75.00. If there is a split sale the employee is not entitled to the bonus as each individual had to make the sale on his or her own to be entitled to the bonus. Five whole sales would entitle one to the bonus. If an employee has four full sales and one split sale, the employee does not get the bonus.”

[32] Ms. Bernard further described the company’s bonus policy. She stated *inter alia* as follows:

“It is not the company’s policy to allow two employees to decide who should get the credit for a split sale. Once it is split both of the employees get the commission.”

[33] She stated *inter alia* further as follows:

“I am not aware of a company policy whereby the salesperson who did the greater part of the sale can be credited with making that sale.”

[34] In answer to Mr. Cumberbatch, Counsel for the Employee, Ms. Bernard stated *inter alia* as follows:

“When there is a split sale the commission is split. When it comes to the bonus and it is split, one person cannot get the bonus. One salesperson who is involved in a sale of an item with another salesperson can give credit to the other salesperson for the sale. But this would be wrong. I am not aware of a policy where a salesperson who had the greater impact on a sale can take credit for that sale. It is not the practice for one salesperson who has had the greater impact to take credit for the sale.”

[35] The Diamonds International sales document which evidenced the disputed sale is numbered 27598. It involved the sale of a Sandals necklace. Mr. Joseph’s sales identification number is 17. This number is located in the section entitled **“Sold By”** of the Employer’s sales receipt. This document was admitted as **“CJ -4.”**

[36] In answer to Mr. Cumberbatch, Ms. Bernard stated that whilst she was not familiar with the signature of the female employee of the store, *“the note before the signature was written by [the female employee].”* That note read as follows:

*“Name of signature on slip card and TC verified by
Roxanne.”*

[37] Ms. Bernard also stated that the notation upon the sales receipt in the **“Description”, “Origin” and “Sold By”** sections were written by the female employee.

[38] In a further response to Counsel for the Employer, Ms. Bernard stated that the female employee Roxanne confirmed to another female employee named Liz that the customer with respect to this disputed sale was hers.

[39] There is clear evidence that at least three persons were associated with this disputed sale. Firstly, Mr. Joseph made some contribution. Secondly, a female employee named Roxanne performed some of the work for the customer. Thirdly, another female employee named Liz also performed some tasks associated with this sale.

[40] Mr. Joseph's evidence that "*there was no dispute with respect to the April 06, 2006 sale*" is clearly untrue.

In answer to his Counsel Mr. Joseph stated *inter alia* as follows:

"Roxanne informed me on April 07, 2006 that Mr. Nino wanted to see me. He was the Sales Manager at that time. He wished to know if Roxanne gave me a sale to qualify for a bonus. I told him this was not the case. The General Manager and his wife and myself were present at the meeting along with the Sales Manager... Disputes centred around the same type of sale."

[41] A close examination of Mr Joseph's evidence with regard to Roxanne's contribution to complete this sale reveals that she made a significant contribution. According to his own evidence:

- (a) Roxanne started the sale of the necklace to the customer;
- (b) He asked Roxanne to go ahead and assist the customer after she returned to the store;

- (c) Roxanne examined the customer's traveller's cheque;
- (d) Roxanne verified the customer's signature on the traveller's cheque;
- (e) Roxanne also verified the customer's ship card.

[42] What was Mr. Joseph's input in connection with this sale? His evidence is that after Roxanne commenced negotiations with the customer to purchase the Sandals necklace and as the customer left the store, at this stage Mr. Joseph ***"was under the impression that the customer wanted to make the purchase."*** This clearly shows that Roxanne's input was significant enough to warrant Mr. Joseph's opinion that Roxanne had convinced the customer to purchase the item.

[43] Even if the customer was leaving the store, Mr. Joseph's evidence is that the customer saw the item at another store for a cheaper price. He encouraged her to ***"have a look at the other store and in the meantime [he] would try to work out a discount for her"***.

[44] Frankly, I do not believe Mr. Joseph's evidence with regard to any efforts of his to obtain a discount for the customer. This is so because the item cost US\$39.00. Even if a per centum discount was obtained, this has no real significant impact upon the selling price.

[45] Mr. Joseph clearly had very little time to spend with this customer. After the customer returned he was involved with another customer. According to him he ***"took longer with the other customer than***

expected.” At this stage Roxanne completed the sale which she started.

- [46] An analysis of the evidence therefore reveals that Roxanne and not Mr. Joseph made a greater contribution towards the sale of this Sandals necklace than Mr. Joseph. In all of the circumstance of this case, Mr. Joseph took credit for the sale of one Sandals necklace which should have been credited to Roxanne. This is also in keeping with Ms. Bernard’s evidence that the credit for the sale remains with the first employee despite the second employee’s assistance.

THE SECOND ISSUE

If the facts do merit a finding that the Employee’s claim of a credit of one Sandals necklace resulted in a wrongful payment of the US\$75.00 daily incentive bonus to him, did his action constitute misconduct which justified the Employer to summarily dismiss him?

- [47] Mr. Joseph in answer to Counsel for the Employer was forced to concede that *“in light of [his] definition of what a split sale is, yes this sale of 27598 could be considered a split sale.”* In an earlier response to his Attorney-at-Law he stated *inter alia* that *“In this split sale situation both persons are said to have made the sale. If there is one split sale and four whole sales then no one is entitled to the US\$75.00.”*

- [48] Mr. Joseph however further asserts that although this sale was split between himself and Roxanne, he was however entitled to have the sale credited to him.
- [49] According to Mr. Joseph he states that “*two salespersons have a discretion if the commission is going to be small and they can decide who takes the sale.*”
- [50] According to Mr. Joseph, this discretion was sanctioned by the Employer. Ms. Bernard disputes this. In any event, she stated that it is “*wrong.*”
- [51] It makes for simple transparency if two salespersons are involved in a transaction for both workers to share the commission in equal proportions.
- [52] I do not believe Mr. Joseph’s evidence of the existence of an employee’s discretion to grant to another employee the right to claim the entire commission. In a modern sales environment this assertion is clearly unworkable. It would have the potential of encouraging a state of dishonesty.
- [53] It also would have the potential of encouraging sales gridlock. For example, who is to determine between two employees what is the correct quantitative and qualitative impact of an employee’s contribution towards a sale? If both parties do not agree as to what are each one’s respective contributions then potentially who gets the commission?

- [54] No evidence was produced that the practice to which Mr. Joseph made reference to existed at Diamonds International. Ms. Bernard disputes this. I hold that no such practice existed at Diamonds International in 2006.
- [55] The sale of jewellery by the Employer demands that it receives from its employees a level of trust and confidence. In his capacity as a salesperson he is expected to be honest in all of his activities. These include the sales of the Employer's products.
- [56] With regard to the incentive bonus scheme, the execution of this initiative required that an employee complete five sales in one day. If an employee informs the Employer that he has completed five sales, the Employer expects the employee to be truthful in his communication with the Employer.
- [57] Where an employee obtains a benefit in the form of a payment of the incentive bonus in circumstances where the employee has not completed five sales in a day, then this is an act of dishonesty. Should this act be repeated then the employer would be making payments to an employee in circumstances where the employee would not be so entitled to receive them.
- [58] In matters which involve allegations of misconduct, a proper investigation of the complaints against the employee must be carried out. The nature and extent of such an exercise is not defined in the authorities.

[59] In this case the Employer gave the Employee an opportunity to respond to the allegations that he took credit for a sale to which he was not entitled. He explained to the Employer the nature of the transaction. This was not well received by the Employer. It dismissed him.

[60] In the circumstances of this case, the Employer carried out a proper investigation of the events which took place on April 06, 2006 with regard to the disputed sale.

[61] **In Smith & Wood's Employment Law (op cit) at page 432** the learned authors state *inter alia* as follows:

“Much will therefore depend upon the context and the nature of the reason, so that for example, a relatively minor instance of dishonesty may warrant summary dismissal, particularly if the employee's job involves dealing with money,...”

[62] In this case the Employee unlike the circumstances of **Sinclair v Neighbour [1966] 3 ALL E.R. 988 (CA)** did not deal with money. However, his actions resulted in the payment of money by the Employer to him, to which he was not entitled.

[63] Mr. Joseph seems to have been at the outset on April 06, 2006 to have been in an indecent haste to obtain five sales on this day. In his own Witness Statement at **paragraph [4]** he states *inter alia* as follows:

“On the day in question..... while unpacking the jewellery and engaged in our usual banter I told them “ I am going to get

the bonus today, I am feeling it.... I am telling you today is my day.”

[64] In his Witness Statement at **paragraph [11]** Mr. Joseph stated *inter alia* as follows:

“I placed several applications seeking employment but was unsuccessful in finding a job. I was employed by the Immigration Department in January of 2007. [D]uring one of the training sessions I was called into the office by [the] Chief Immigration Officer. [H]e enquired as to whether or not I was fired from Diamonds International for stealing because that was the word on the ground and he was going to investigate. [S]o if I know it is so, don’t come back tomorrow to face the embarrassment.....”

[65] Paragraph [64] gave the clear impression that Mr. Joseph was unemployed. After he gave his full evidence the Court asked him if he was employed. He stated that from January 2007 to the date of hearing he obtained employment as an Immigration Officer. He works for a monthly salary of \$3,500.00.

[66] Mr. Joseph’s actions as an employee of Diamonds International on April 06, 2006 clearly demonstrate that he shattered the trust and confidence which was vital for the continuance of the employee/employer relationship. He could no longer continue in his position as a sales person and function effectively so as to command the trust and confidence of the Employer.

[67] In all of the circumstances of this case, this Court finds that the Employee's actions on April 06, 2006 constitute misconduct which justified the Employer to summarily dismiss him in accordance with Section C58 (1) (a) of the Labour Code.

THE THIRD ISSUE

If the facts did not justify the Employer to summarily dismiss the Employee what is the measure of damages to which he may be entitled?

[68] Having regard to the findings at **paragraphs [66] and [67]** a discussion of this issue is unnecessary. The Employee's Reference is dismissed. There shall be no order as to costs.

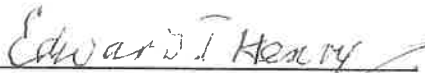
Dated this 30th day of July 2009



PHILIP A. PILGRIM

President

I agree



EDWARD T. HENRY

Member

I also agree



GENEVIEVE L. I. BENJAMIN

Member