

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 3 of 2007

BETWEEN:

JOLIE WATKINS

Employee

and

CARIB HOLDINGS LIMITED T/A BLUE WATERS HOTEL

Employer

Before:

The Hon. M. Althea Crick

Chairperson

The Hon. Genevieve Benjamin

Member

The Hon. Oscar Frederick

Member

Appearances:

**Mr. Egbert Joseph of Antigua & Barbuda Hotel Management
Association for the Employee**

Mr. Anderson E. Carty for the Employer

2008: November 19, 21

2009: February 9

2010: January 7

JUDGMENT

Unfair Dismissal – Employer claims gross insubordination.

- [1] By Reference filed on June 1, 2007, Mr. Egbert Joseph, acting for the Employee, notified the Court of a trade dispute between the Employee and the Employer and by Memorandum filed on January 18, 2008, submitted that the Employee's dismissal was unfair.

- [2] The Employee also contended in the said Memorandum that (a) as Front Office Supervisor she was responsible for making the weekly department roster which was signed by the General Manager before it was posted, (b) she never had any problem with any manager about the weekly roster, (c) she was always evaluated by her supervisor and was complimented for the job that she was doing, (d) she was asked to assume the duties of guest services/wedding coordinator from November 2006 to March 2007 when the coordinator went on maternity leave, and (e) the termination of her services on December 7, 2006 was unfair.
- [3] The Employer (**the Hotel**), filed its Memorandum on November 18, 2008. In it the Employer claimed, *inter alia*, that (a) as a result of complaints received from several employees within the Front Office department, the General Manager, Randall Wilkie, instructed that the Front Office Supervisor work at least one night shift per week, (b) as a result of a request made by a senior employee from the Front Office department, the General Manager altered the department's schedule for the week of December 9, 2006, (c) the Employee changed the General Manager's alteration and as a consequence of her actions, she was cited for gross insubordination and her services were terminated (d) the termination of her services on December 7, 2006 was justifiable and fair.
- [4] The Employee gave evidence on her own behalf and called as witnesses Charmain Ephraim, Cindy Looby and Keith Martel. The Employer called Karen Whitehead, Makeba Gunthrops and Tasean Moore as witnesses.

HISTORICAL BACKGROUND

- [5] The Employee, Jolie Watkins, was employed at Blue Waters hotel as a Receptionist on July 27, 1999. On May 5, 2003 she was promoted to Front Office Supervisor, the position she held at the time of her dismissal.
- [6] One of her duties was to *“complete on a weekly basis, on or before every Thursday, the Front Office Schedule”* for approval by the General Manager. As a result of complaints received by employees of the Front Office Department, the General Manager instructed the Employee to schedule herself to work at least one evening shift – 3:00 p.m. to 11:30 p.m. - per week.
- [7] On or about November 30, 2006, an employee in the department made a request of the General Manager which resulted in his altering the schedule prepared for the week ending December 9, 2006. Upon observing the change, the Employee drew a line through the change made by the General Manager. This action was drawn to the attention of the General Manager who proceeded to re-instate the original change he had made.
- [8] The Employee telephoned the General Manager to discuss the changes made to the schedule. He was unable to address the matter at that time. He left the premises that day without having done so.
- [9] The following day, December 1, 2006, the Employee reported sick and subsequently received a telephone call from the General Manager advising that she had been placed on suspension pending the outcome of a disciplinary hearing.

[10] The disciplinary hearing was held on December 6, 2006 and the Employee was dismissed for gross insubordination effective December 7, 2006.

[11] The letter of termination dated December 12, 2006 reads as follows:-

12 December 2006

*Ms. Jolie Watkins
Bendals
St. John's*

Dear Ms. Watkins,

This letter follows to document the outcome of disciplinary meeting held with you at the Hotel on Wednesday, 6 December, 2006 which culminated in a decision to terminate your employment with the Company effective 7 December, 2006 for gross insubordination.

The meeting which was also attended by your Union representative, Mr. Egbert Joseph and the Company's Labour Relations Consultant, Mr. Anderson Carty, discussed an incident that occurred on Thursday, 30 November 2006. The details of the incident are as follows:

On the day in question, I perused the weekly department roster, which was placed in my box for approval. I observed that, against my specific instructions that you work at least one (1) night per week, you had scheduled yourself on all morning shifts. That same day, I had a request from a member of the department to work at least (1) morning over the weekend to facilitate an activity with her young children. Consequently, I made a single adjustment to the schedule for Sunday, 3 December 2006, alternating both your shifts from 8 a.m. – 5 p.m. to 3 p.m. – 11 p.m. I initialled the change and placed the schedule in your box for posting.

Sometime during that day, I received a call from you while I was dealing with a situation in the kitchen, requesting to speak with me about the schedule. Since it was not convenient at the time to talk, I advised you that we would speak later. Unfortunately, however, I inadvertently left the property that afternoon not remembering to dialogue with you. Strangely though, I recalled that while leaving the lobby, you were conspicuously seated at the tour desk, which is in very close proximity to the exit and you never took occasion to remind me. Perhaps it was not important enough for you to do so. On Friday, 1 December

2006, the following day, I received a message that you had called in sick.

On this latter date, a member of the front office department brought the roster to my attention noting that the changes that I had made and initialled were scratched out and the original form reinstated and bearing your initials. Additionally, I had reports from staff members informing that you had openly objected to the changes I had made and further said that you were not going to work accordingly. It was also reported that you intimidated to at least two (2) other staff members that I did not have any right to change your schedule without a discussion with you. It appeared that on the basis of this objection, you took an overriding decision to change back the roster.

In view, I called you at home and advised that duties were suspended pending the outcome of disciplinary hearing of which reference is herein made.

At the meeting, you were asked to explain 1) Why is it that you chose to ignore my specific directive, given less than a month ago you scheduled yourself to work at least one (1) night shift per week and; 2) By or with what authority did you act, in scratching out the changes that I had made to the schedule and reinstated and initialled your own changes.

In your defence, Mr. Joseph, your Union representative respectfully suggest that it would have been "nice" if I had spoken to you before making the changes and perhaps your reaction would have been different. As the meeting progressed however, it was noted that nothing further could have been said to offer any reasonable justification or mitigation against your actions, taken as a whole even failing an audience with me. After the one call to me while in the kitchen on 30 November, 2006, you made no further attempt to discuss the matter with me. Your intention was therefore made quite clear.

To imagine that you could have the temerity to override a decision of my office is beyond me and I daresay the ordinary comprehension of a reasonable individual. Further, against the backdrop of the reports that were received, your actions amount to gross insubordination and therefore, in our view, serves to preclude further continuation of the employment relationship beyond 7 December 2006. We will pay your weekly wages up to and including 6 December 2006, in the normal manner.

I take this opportunity to wish you the best in your future endeavours.

Yours sincerely,

'Signature'

Randall Wilkie

General Manager

*Copy: Mr. E. Joseph, President A&B Hotel Management Association
Mr. A Carty, Industrial & Labour Relations Consultant
A&B Workers Union*

THE EMPLOYEE'S CASE

- [12] The Employee gave evidence. She stated that she resides at Jennings Village, St. Mary's Parish. The signature to a Witness Statement which was filed on her behalf on September 11, 2008 is hers. The contents are true and correct.
- [13] The Employee's evidence is that one of her responsibilities as Front Office Supervisor was to prepare a weekly department roster showing the days and times that employees within the department would work. During the period December 3 to 9, 2006, she was working as Front Office Supervisor and Guest Services officer. When she made the schedule for the week ending December 9, 2006 she was still working as wedding co-ordinator. She was informed by the UK office of a wedding couple who was due to arrive on Saturday, December 2, 2006.

- [14] She explained that when a wedding is to take place, a letter is given to the couple when they arrive at the hotel. That letter stipulates the time when they should meet with the co-ordinator. The couple meets with the wedding co-ordinator to complete legal documents. An orientation schedule is arranged. In addition a date is given for the marriage. The couple completes legal documents and are taken to the legal office. They also discuss with the co-ordinator the various items which they may require. They include – flowers, the variety of cake and other items. The legal papers are taken to the Ministry of Legal and Justice Affairs for approval. The process may be time consuming. She accompanies the couple, waits for them and takes them back to the hotel. She did not have orientation with them on Sunday, December 3, 2006 because she was suspended on December 1. When she made the schedule, she was mindful of the fact that the guests were arriving. She chose Sunday, December 3, 2006 as the date for the orientation of the guests.
- [15] After she made the weekly schedule, she placed it in the General Manager's box for his approval. There was a request for a change for Mr. Charles Greene. No other person made any special request for that week. The schedule was placed in the box on Wednesday, November 29, 2006. She saw the schedule in the front office box on November 30, 2006. The problem that she had with the schedule was an exchange that was made which would affect her meeting with the said wedding couple on December 3, 2006. She made several attempts to speak with the general manager. This concerned the schedule and the fact that she had arranged to meet a couple on December 3, 2006 at 9:15 a.m.
- [16] She spoke to Karen Whitehead concerning the matter. Ms. Whitehead suggested that she speak to Mr. Wilkie, the General Manager. When she succeeded in speaking with Mr. Wilkie he said he was in the hotel's kitchen. He was busy dealing with a matter. He would speak to her after he completed

his task. She did not get an opportunity to speak with Mr. Wilkie. He was never told about the schedule. The schedule was never posted because she still had intentions of speaking with Mr. Wilkie regarding the change. It was left in the front office box. The next day she called the hotel. She reported that she was unable to attend work due to illness.

- [17] The following day, December 1, 2006 Mr. Wilkie telephoned her at home. He asked her who gave her the right to alter the change he made to the front office schedule. In addition he observed who she thought she was to make the alteration. She tried to explain to Mr. Wilkie but did not get the opportunity to do so. He telephoned her again and informed her that she was suspended. Additionally, she should report to work for a meeting on December 6, 2006. He informed her that she was dismissed. She was given a letter of dismissal on December 12, 2006.
- [18] She recalled being called to a meeting on October 4, 2006. The General Manager spoke about the fact that he required her to work nights. He spoke of a meeting that was held with certain of the hotel staff. At that meeting some of the staff claimed that they were victimized by Ms. Watkins. They expressed disapproval of her general attitude. The General Manager had not received any complaints from the staff since that meeting.
- [19] Under cross examination, the Employee explained that she had worked the 3.00 p.m. to 11.30 p.m. shift, not to supervise the staff, but to work that shift. She had worked the 3.00 p.m. to 11.30 p.m. shift from March 2006 to November 30, 2006 on more than one occasion. There were occasions when the 3.00 p.m. to 11.30 p.m. shift would require more than one person and she would schedule herself to work. As supervisor, she reported to the Assistant Manager Front Office who was responsible for her evaluation.

- [20] She recalled that about a month after Mr. Wilkie came to work at Blue Waters, he called her into the office. He showed her some front office schedules that were brought to his attention. They revealed that she was rostered to work in the day only. Mr. Wilkie instructed her to immediately change the current schedule. That was done as requested. Having made the change, she went to Ms. Ephraim to explain why the schedule showed her working during the day. Mr. Wilkie got upset and stormed out of the office and slammed the door. She admitted in her witness statement that Mr. Wilkie asked her to work the night shift. This was the second time he requested her to do so.
- [21] Further under cross examination the Employee conceded that Mr. Wilkie would have wanted her to comply with the changes which he had made. However, she contended that later in the day she met the General Manager at the *“admin office door.”* He informed her that he was still busy. She did not agree with counsel for the Employer that the only time she saw Mr. Wilkie was when he was leaving that day.
- [22] Under further cross examination, the Employee explained that the General Manager does not retrieve items from her box. In addition, he could not have known that she had concerns about the schedule. She also admitted that the onus was on her to discuss the change with the General Manager.
- [23] When questioned about the persons she spoke with concerning the changing of the schedule, the Employee named Tasean Moore as a staff member with whom she did discuss it. She asked Mr. Moore *“If someone made a change to a schedule should they not discuss it with the person?”* The Employee could not recall if she made any other comment for others to hear. She could not recall saying anything about the schedule in the presence of other staff members.

- [24] Still under cross examination, the Employee explained that to some degree she did not work one night every week as the General Manager requested. However, every time she took the schedule to him to sign she explained to him her reasons for not working the night schedule. He agreed with it and signed it. When she was not going to work the night shift she would ***“hand the schedule to him.”*** She conceded that it was bad judgment for her to have changed the schedule, before discussing it with the General Manager. She knew he had changed the schedule.
- [25] She stated that there were two or three weddings which were scheduled to take place during the week commencing December 03, 2006. She had scheduled herself to work during the day. She knew that she had undertaken two areas of responsibility, namely – wedding co-ordination and front office work. Most of these activities occurred during the day. It was, however, never her intention to defy the General Manager’s instructions relative to the change in the schedule.
- [26] Under further questioning, the Employee at first stated that she did not get an opportunity to explain to Mr. Wilkie why she had changed the schedule. She later admitted that at the meeting of December 6, 2006 she was given an opportunity to explain why, contrary to his instructions, she scheduled herself to work during the day.
- [27] Ms. Watkins stated further that if Mr. Wilkie approved a schedule, at no time hereafter did he express any concern that she had scheduled herself to work. She explained that she made the change to the schedule minutes before she left work. She telephoned the security department and was told that Mr. Wilkie left the premises.

- [28] Three witnesses were called by the Employee. They were Charmain Ephraim, Cindy Looby and Keith Martel. Each in turn attested to the accuracy of the signature on his/her witness statement.
- [29] Ms. Ephraim was the hotel's Assistant Manager with responsibility for the front office for the period October 04, 1999 until September 29, 2006. Her Witness Statement was filed on November 10, 2008.
- [30] In her Witness Statement she indicated *inter alia* that during the period of her employment, Ms. Watkins was the Front Office Supervisor. She found her to be ***"capable in her job, and also a hard working person."*** She stated that ***"the front office was supervised professionally."***
- [31] She further stated that it ***"has always been that the Front Office Supervisor worked during the day and fill in nights during the vacation schedules to cover the shift."***
- [32] According to her ***"the Front Office Supervisor's coverage was most vital during the day, as there were a number of staff on shift to be supervised compared with only one staff at night."***
- [33] In her testimony before the Court Ms. Ephraim described the Employee as a ***"precise individual, professional, doing things in a timely manner."*** She recalled a meeting about the Employee's schedule. Under cross examination, Ms. Ephraim stated that she had cause to write to the Employee about her performance. She explained that during her tenure as Assistant Front Office Manager, as the Employee's supervisor, she approved the schedule. As Mr. Wilkie requested, a copy of it is placed on his desk. She was aware of Mr. Wilkie's instructions for the Employee to work at least one night per week. She did not agree with counsel for the Employer that the Employee did not work one night per week as instructed by the General Manager.

- [34] Ms. Cindy Looby commenced employment with the hotel in June 2001 as a receptionist. She was promoted to Guest Services/Weddings Coordinator in January 2003. She resigned in October 2007. During her period of employment she worked with Ms. Watkins. A Witness Statement was filed on her behalf on November 10, 2008.
- [35] In her evidence to the Court she stated that, as a receptionist at the hotel, she was supervised by the Employee. She was a good supervisor. There were a few complaints from staff who *"did not get what they wanted."* The Employee did work night shifts.
- [36] The third witness called by the Employee was Mr. Keith Martel. A Witness Statement was filed on his behalf on November 10, 2008. He was employed at the hotel as its General Manager from September 2000 until October 2005.
- [37] In his evidence to the Court, Mr. Martel explained that the front office schedule was prepared by the supervisor. It was then sent to the front office for approval. He would thereafter receive a copy. Once the schedule was approved and he was in possession of a copy, changes were not to be made without his prior approval. The front office supervisor or manager could make a change.
- [38] In response to questioning by Mr. Egbert Joseph for the Employee, Mr. Martel further stated that if he saw something in the schedule that was not correct he would consult with the persons who prepared the schedule before making any changes. He had the authority as a general manager to change what he wanted on that shift. The fact that he was not approving the schedule did not prevent him from giving a directive to change the schedule.

[39] He concluded his evidence by saying that a problem may arise if he made a change to a schedule without consulting the person who made schedule. Circumstances may arise where a supervisor may subsequently explain to him that she made a change. Having heard the explanation he may then agree with what she had done.

THE EMPLOYER'S CASE

[40] The Employer called three witnesses. They were Ms. Karen Whitehead, Ms. Makeba Gunthropes and Mr. Tasean Moore. Ms. Gunthropes and Mr. Moore each attested to the accuracy of their witness statements and their signatures. Ms. Whitehead requested that the word "**May**" in paragraph one of her Witness Statement be changed to "**March**".

[41] A witness Statement on behalf of Ms. Karen Whitehead was filed on November 11, 2008. In that statement, she stated that she currently is employed at Blue Waters Hotel as its Personnel and Administrative Manager. Prior to her appointment to this position in March 2008, she worked in the capacity of Personal Assistant to the General Manager.

[42] In her evidence she stated that she was at work on November 30, 2006. On that day an issue involving Ms. Watkins, the Employee, arose. The issue concerned some discrepancy with the front office schedule. The Employee brought to her attention the fact that the General Manager, Mr. Wilkie, had changed the front office roster. The Employee further explained the reason why she had prepared the roster in that manner. According to her, "***if you have an explanation, it should be given.***" The Employee stated that she

could not understand why the General Manager did not talk to her before changing the roster.

[43] She further stated that she knows Ms. Watkins. She was employed at the hotel as the Front Officer Supervisor. She also knows Mr. Randall Wilkie. He was the General Manager of the hotel from March 2006 to April 2008.

[44] In her Witness Statement at paragraph 7 thereof she stated *inter alia* that she ***“could not understand why (Ms. Watkins) did not take (her) advice and communicate her concerns to (Mr. Wilkie) as she did to me.”***

[45] Under cross examination, Ms. Whitehead stated that she could not recall if anyone else was present when the Employee spoke to her about the schedule. However, she told the Employee she thought the explanation given for changing the schedule was reasonable. She also stated that she had seen the Employee work nights after being instructed by the General Manager to do so.

[46] During examination by Mr. Egbert Joseph for the Employee, Ms. Whitehead explained that she did not know the Employee was suspended as a punishment. She was asked by the General Manager to obtain statements from staff members who were aware of what had happened with the schedule changes. She further explained that the General Manager instructed the staff members Mr. Tasean Moore, Mr. Rickford Benjamin and Ms. Makeba Gunthropes to write their statements and give them to her. She also stated that she would be surprised that the General Manager would sign a schedule which did not show the supervisor working the night shift for one night per week.

- [47] A Witness Statement for Ms. Makeba Gunthropes was filed on October 30, 2008. She is currently employed as the hotel's Front Office Supervisor. Prior to her appointment to this position she functioned as the hotel's receptionist.
- [48] She knows Ms. Watkins. She was employed as the hotel's Front Office Supervisor. She previously reported to her. She knows Mr. Randall Wilkie. He is the former General Manager of the hotel.
- [49] In her Witness Statement she stated that she was on duty at the hotel on Thursday 30th November, 2006. She observed that Mr. Wilkie had made a change to the roster for the week ending December 03, 2006. This change affected her directly.
- [50] The change required Ms. Watkins to work on December 03, 2006 from 3:00 p.m. to 11:00 p.m. It required Ms. Gunthropes to work from 8:00 p.m. to 5:00 p.m.
- [51] According to Ms. Gunthropes, Ms. Watkins came to the office and checked the roster. She looked ***"upset"***. She spoke with Ms. Karen Whitehead. She told her that ***"nobody asked her anything before changing the schedule."*** Ms. Gunthropes heard Ms. Whitehead inform Ms. Watkins to ***"speak with the boss"*** Mr. Randall Wilkie.
- [52] According to Ms. Gunthropes the matter was brought to Mr. Wilkie's attention. He requested to have a look at the roster. He saw the changes made. He again amended the roster and wrote the following note:

"Do not change without my permission."

- [53] Ms. Makeba Gunthropes in her examination in chief stated that she had spoken to the General Manager about making a change to the schedule. He asked her to provide him with the schedules for the last few weeks.
- [54] A Witness Statement was filed on behalf of Ms. Tasean Moore on November 11, 2008. In that statement he indicated that he is employed at the hotel as a receptionist.
- [55] He knows Ms. Watkins. He was formerly her immediate Supervisor in the Front Office Department.
- [56] He recalled November 30, 2006. She was on duty at the hotel. It was his understanding that Ms. Watkins' Employment was terminated because she made changes to the Front Office Roster after it *was "amended and approved by the Manager."*

RELEVANT ISSUES

- [57] The substantive issues are as follows:
- i) Was the Employee dismissed fairly in keeping with Section C59 (1) of the Antigua and Barbuda Labour Code?
 - ii) If the answer to (i) above is no and the dismissal is found to be unfair what is the measure of damages that should be paid to the Employee.

THE EMPLOYEE'S SUBMISSIONS

- [58] Mr. Egbert Joseph for the Employee submitted that the Employer did not present any evidence to show gross insubordination by the Employee. The Employee was scheduled to work as wedding co-ordinator when the holder of the position went on maternity leave. The Employer's witness, Ms. Karen Whitehead, stated clearly that the Employee's reason for scheduling herself to work the day was reasonable. She had a wedding to co-ordinate during the course of that week. This is why she suggested that the Employee should speak with the General Manager.
- [59] Mr. Joseph further submitted that a reasonable manager would have first sought to learn from the supervisor the reason for preparing the schedule as she did before making any changes. The evidence of the hotel's former general manager, Mr. Keith Martel, is used to support this assertion.
- [60] Additionally, it is Mr. Joseph's submission that Ms. Watkins attempted to contact the General Manager to discuss the change he had made even though he did not see it fit to discuss it with her before making the change. This, Mr. Joseph contends, is not the action of someone who was intent upon gross insubordination.
- [61] In all of the circumstances of this case Mr. Joseph submits that her dismissal was unfair.

THE EMPLOYER'S SUBMISSIONS

- [62] Mr. Anderson Carty for the Employer submitted that Mr. Wilkie “*made a single change to the schedule, alternating shifts between the Employee and Ms. Gunthropes.*” (The emphasis is Mr. Carty’s). “*She now only had one (1) night to work that week.*”
- [63] According to Mr. Carty “*on November 30, 2006, she made a single attempt to speak directly with the General Manager about the schedule but he was busy dealing with a situation in the kitchen department; he told her that he would speak with her before the end of shift*”. He inadvertently failed to do so.
- [64] The Employee having attempted, without success, to speak with the General Manager about the schedule on Thursday 30th November, 2006, made no further attempt to do so after that date, the “*new*” schedule being due to come into effect from Sunday 3rd December, 2006.
- [65] He enquired “*whether or not having failed to secure an audience with the General Manager on November 30, 2006, it was an acceptable course of action to have resorted to altering the changes made by him and marking same with her initials.*”
- [66] In addition, Mr. Carty submitted whether or not the Employee’s action, taken as a whole, on November 30, 2006, evinced clear and deliberate intention not to comply with the changes made to the roster by the General Manager.

[67] Mr. Carty inquired “*whether or not, having regard to all surrounding circumstances, the Employer acted reasonable, or unreasonable, in its decision to dismiss the Employee for the reason it did.*”

[68] Mr. Carty submitted that Ms. Watkins “*did not provide the Court with any reasonable or plausible rationale, whatsoever, as to why it was necessary for her to have proceeded to alter and initialed the changes that the General Manager had made to the schedule.*”

[69] Whilst Ms. Watkins may have felt that she had good reasons to schedule herself for the morning of November 30, 2006, “*there can be no justifiable reason for her to have proceeded to alter the changes made by the General Manager.*”

[70] When all of the evidence is examined by the Court Mr. Carty submits that “*on a fair balance of probability rest clearly in favour of the Employer, in this matter.*”

[71] Mr. Carty cited Rideout’s Principles of Labour Law (4th Edition) at page 201. The learned author states as follows:

“In numerous decisions, the Employment, Appeal Tribunal has said that it is not the task of the tribunal to decide whether, in its view, the decision to dismiss was reasonable, but whether a reasonable employer could take that view.”

- [72] (a) Mr. Carty submits that Ms. Watkins' action amounted to misconduct. The Court *"should only find the Employer's decision unfair if it was so wrong that no sensible or reasonable management could have arrived at a decision to dismiss, given the evidence and substantial merit of the case. In support of this submission he cited Vickers Ltd. v Smith [1977] I.R.L.R."*
- (b) Although the statement of principle in Vickers v Smith is accurate in law it has been held in **Iceland Frozen Foods Ltd. v Jones [1982] I.R.L.R. 439 (E.A.T)** that Industrial Tribunals would do well not to direct themselves by reference to it.

- [73] In light of the evidence Mr. Carty asserts that *"the Employee's actions taken as a whole amounted to gross insubordination or alternatively some other substantial reason of a kind, which gave rise to good cause for fair termination."*

ISSUE NO. 1

Was the employee dismissed fairly in keeping with Section C59 (1) of the Antigua and Barbuda Labour Code?

THE LAW

- [74] Section C 56 of the Antigua and Barbuda 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.”

[75] Sections C 58 (i) (a) and (2) of the Antigua and Barbuda 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);

(f);

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.”

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

“C 59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct 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);

THE LAW -MISCONDUCT

[77] No fixed rule of law exists which defines the degree of misconduct that will justify dismissal. It has been defined in one case *“as to interfere with and to prejudice the safe and proper conduct of the business of the company and therefore to justify immediate dismissal.”*

- See **Jupiter General Insurance Co. Ltd v Shroff [1937] 3 All.E.R.67 Lord Maugham at page74B.**

[78] Summary dismissal is a *“strong measure.”* This action is available to an employer in circumstances where the offence is of such a nature which justifies this action. The standard of proof has been described as *“strict persuasive and convincing.”* See **Cable and Wireless v Hill and Others (1982) 30 WIR 120 per Berridge J.A. at page 129.**

DISOBEDIENCE OF A REASONABLE ORDER

[79] John Bowers in the textbook entitled “*A Practical Approach to Employment Law*”, Seventh Edition Oxford University Press, London, 2005 states *inter alia* at paragraph 13.134 as follows:

“The unfair dismissal jurisdiction maintains the fundamental principle of the contract of employment that the employee must obey the lawful and reasonable instructions of the employer. There must, however, be a serious breach of the rules to justify dismissal just as at common law ...”

[80] I derive some helpful guidance from reading of the Employment Appeal Tribunal (E.A.T) decision of **Union of Construction Allied Trades and Technicians v Brian** [1980] I.R.L.R. 357. In this case an employee was given a lawful instruction. He however refused to obey it. The Industrial Court held in his favour. This decision was upheld by the Employment Appeal Tribunal (E.A.T.)

[81] Mr. Justice Talbot in writing the Court’s decision referred to the two matters which the Court must take into consideration so as to determine whether or not the dismissal is fair or unfair. Firstly at page 359 No. 14, Mr. Justice Talbot stated *inter alia* as follows:

“what has to be considered, when the reason for dismissal is the refusal to obey an order, is what was required to be carried; that is a consideration of the employers’ conduct, and the employers’ requirement.”

[82] Secondly, the other factor which the Court must take into consideration along with the nature of the order which was required that he should obey was stated at page 359 No. 14 was as follows:

“Where, as in the case, the reason for dismissal was the refusal to obey a lawful order, it seems to us plain that there must be considered, not only the nature of the order but the circumstances surrounding the giving of that order and that involved a consideration of all the factors to which we have referred and, also, the reason for not carrying out that order. When those matters have been considered, then the Industrial Tribunal rightly has to consider whether in the circumstances, having regard to equity and the substantial merits, the employers were reasonable in treating that as the reason for the dismissal.”

DISCUSSION OF THE EVIDENCE

[83] Mr. Wilkie gave no evidence in this case. Mr. Carty at paragraph 68 of this judgment is of the view that Ms. Watkins provided no plausible reason why she altered the duty roster. I do not agree.

[84] There is evidence that Ms. Watkins sought to commence a discussion with Mr. Wilkie with regard to the change which she made.

[85] Mr. Wilkie did not make himself available to discuss the matter with Ms. Watkins. He had previously done so. It was therefore incumbent upon him to spend some time with Ms. Watkins to hear what she had to say with respect to the change to the duty roster.

- [86] Had he made himself available to speak with Ms. Watkins she would no doubt have explained to him the program which she had previously prepared to meet with overseas guests who were arriving during the course of the week commencing December 03, 2006.
- [87] There is also evidence from Ms. Watkins that on every occasion when she was rostered to work nights she *“would explain to him (Mr. Wilkie) why (she) could not work nights and he would agree.”*
- [88] The failure of Mr. Wilkie to discuss the change with the Employee before making it was an unreasonable act. It was unfair to the Employee.
- [89] The order which Mr. Wilkie required Ms. Watkins to carry out was described by Mr. Carty as *“a single change”* which meant that *“she only now had one (1) night to work that week.”*
- [90] No evidence was led by the Employer to describe why it required Ms. Watkins to work the night shift. Why was this change necessary for the operation of the hotel? If Ms. Watkins did not perform this duty on this night was there loss, if any, which the hotel would have sustained?
- [91] If Ms. Watkins as the Front Office Supervisor was now required to work one night every week, she would supervise one person. During the day she supervised a number of staff.

[92] In addition Mr. Carty for the Employer produced Employer's Exhibit "BWH 1". This was entitled "*Position: Supervisor Front Office. Responsible To: General Manager.*" That Exhibit further stated as follows:

"OBJECTIVE: *-To ensure, that all guests are welcomed and assistance is provided that exceeds their expectation.*

-To ensure the smooth running of the Front Office Operation."

[93] This Exhibit contains a list of 24 specific duties which Ms. Watkins was required to execute on a daily basis. Such duties included the following:

- To ensure that guests are being checked in and out in a friendly, efficient and professional manner. To ensure guestroom accounts are prepared correctly.
- To answer the telephone according to company standard and direct calls accordingly.
- See to it that special requests for guests are being arranged and carried out in a timely manner.
- To ensure the Front Office Staff, including the bell-hops are neatly attired and are wearing a name badge at all times.
- To complete all administrative work and to ensure that the staff complete the same according to standard.

[94] The Employer's requirement for the order to be carried out must take into consideration the nature of her duties of Front Office Supervisor which she was required to perform. It is clear that most of her duties were required to be performed during the day.

[95] It was poor judgment for Ms. Watkins to alter the change made by Mr. Wilkie. The exercise of poor judgment does not however constitute misconduct.

[96] Did the Employer have at its disposal any alternative response to the Employee's action. An explanation given at an appropriate time could easily have resolved this matter.

[97] In Ms. Gunthropes evidence for the Employer at paragraph 52 hereof she referred to the fact that Mr. Wilkie requested that the roster not be amended without his permission. As was previously done, it is his very permission which Ms. Watkins reasonably sought.

[98] In light of all of the evidence in this case, Ms. Watkins' action did not constitute misconduct. The employer acted unreasonably in treating her action as its ground for dismissing her.

CONCLUSION

[99] We considered a number of factors in arriving at our conclusion. These included the demeanour of the witnesses and the arguments presented by both sides. We sought to act in accordance with equity, good conscience and the substantial merits of the case. We had regard to the principles and practices of good industrial relations and particularly, the Antigua and Barbuda Labour Code, in arriving at a decision which is fair and just. We also had regard to

the interests of the persons immediately concerned and the community as a whole.

[100] We have found that the dismissal was not in keeping with Section C59 (1) of the Antigua and Barbuda Labour Code. It was unfair.

ISSUE NO. 2

If the dismissal is found to be unfair, what measure of damages should be paid to the Employee?

THE AWARD

[101] An employee who has been unfairly dismissed is entitled to compensation. Compensation is computed using the following established headings.

[102] **In Kimberly Marcia Lewis and Tradewinds Hotel Ltd Reference No. 17 of 2004 Pilgrim P. President of the Industrial Court stated *inter alia* as follows at paragraph 76**

“There has also developed a practice in this Court that if an employee causes or contributes to his dismissal, the award will be reduced by the extent of his degree of culpability. An example of this practice is Alexander Hughes v Antigua Brewery Limited Ref No. 35 of 2002. In that case Maundy P stated at page 12 of the judgment inter alia as follows:

“Consequently in behaving as he did and causing Mr. Hofman and Mr. Graef to so conclude and found the basis of the dismissal I would hold that the Employee contributed to the dismissal and did so to the extent of 50 per cent – both Mr. Graef and Mr. Hofman should have taken some step to assure themselves that the Employee was genuinely asleep.”

[103] In this judgment we have concluded that the Employee’s dismissal was unfair. However the Employee must bear some degree of responsibility for her actions which, although not of a misconduct nature, contributed in sum measure to her being dismissed. This Court has commented upon her actions at paragraph 24 of this judgment.

[104] The Employee’s decision to alter the roster before having a discussion with the General Manager must be taken into consideration with respect to any award to which she may be entitled. In all of the circumstances of this case this Court holds that her award should be discounted by 10 percentum.

[105] **BASIC AWARD**

The Employee commenced work on June 27, 1999. Her last weekly salary was \$486.40. Her employment was terminated on December 7, 2006. She is therefore entitled to **\$3,648.00** (7.5 yrs. x 486.40)

[106] **IMMEDIATE LOSS**

It is a requirement that an employee should make every effort to mitigate his/her loss. The Employee applied to Jumby Bay Resort, Curtain Bluff Hotel, Hodges Bay Club, Crossroads Centre, Suntours, Trident Adventures Submarine Tours, Alexander Parish (Antigua) Ltd., Jolly Beach Resort and Antigua Marine Services.

[107] The Employee obtained employment at Hermitage Bay Hotel in March 2007 for one month. She earned \$2,500.00 for the month. In July 2007 she was recalled and worked until January 2008 at a rate of \$650 per week.

[108] Having been satisfied that the Employee acted in an effort to mitigate her loss, we award her twenty-five weeks compensation at a rate of \$486.40 per week. The total compensation is \$12, 160.00.

[109] **FUTURE LOSS**

In March 2007, which was two months after the dismissal, the Employee obtained temporary employment at Hermitage Bay Hotel. The Employee earned some \$2,500.00 for the month. This amount is above the basic \$486.40 weekly wage which she earned at Blue Waters Hotel. The same is true when she was recalled by the hotel in July 2007. Her basic weekly wage was \$650.00.

[110] Consequently, the Employee suffered no future loss. We therefore do not make an award under this head.

[111] **MANNER OF DISMISSAL**

We make no award under this heading

[112] **NOTICE PAY**

In keeping with **Section C9 3(b)** of the Labour Code we award the sum of \$486.40 under this head.

[113] **VACATION PAY**

In the Employee's submission and in the filed Memorandum a claim was made for vacation pay. However, no evidence was led in respect of any vacation due. We were not assisted with the details with respect to the number of days due or the time period for which any vacation was earned. In the absence of these details we are unable to grant an award under this head.

[114] **EXEMPLARY DAMAGES**

We make no award under this head.

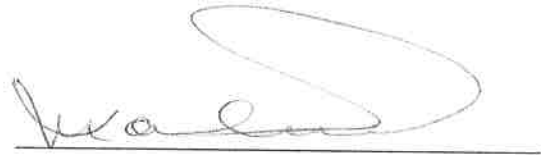
[115] **TOTAL SUM**

The total amount of the award is therefore:

Basic Award	3,648.00
Immediate Loss	12,160.00
Notice Pay	486.40
	16,294.40
Less 10% discount	(1629.44)
	14,664.96

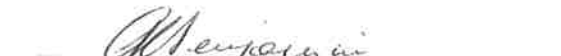
[116] The Employer will therefore pay to the Employee the sum of **\$14,664.96** on or before the **31st of January 2010**. There shall be no order as to costs.

Dated the 7th day of January, 2010.



M. ALTHEA CRICK
Chairman

I agree



GENEVIEVE L. I. BENJAMIN
Member

I also agree



OSCAR A. FREDERICK
Member