

ANTIGUA & BARBUDA**IN THE INDUSTRIAL COURT****REFERENCE NO: 05 of 2008****BETWEEN:****LINELLE SOLOMON****Employee****and****JEWELLERS WAREHOUSE****Employer****Before:****The Hon. Philip A. Pilgrim****President****The Hon. Genevieve L.I. Benjamin****Member****The Hon. Dr. Hayden Thomas****Member****Appearances:****Ms. Cherissa Roberts–Thomas, Marshall & Co.****Attorneys-at-Law for the Employee****Dr. David Dorsett of Watt & Associates –****Attorneys-at-Law for the Employer**

2009: July 30**September 02****2010: March 24**

JUDGMENT**PILGRIM, P:****INTRODUCTION**

- [1] Jewellers Warehouse is a business which operates in Antigua and Barbuda and other Caribbean countries. In Antigua and Barbuda business is conducted at Heritage Quay in St. John's. It is engaged in the sale of jewellery, watches and similar items to locals and

tourists. I shall sometimes refer to it as ***“the Company”, “the Employer”*** or ***“Jewellers Warehouse.”***

- [2] Linelle Shelley Solomon resides at Seaview Farm, in the parish of Saint George in Antigua and Barbuda. She is also referred to as Emily Linelle Shelley Solomon. I shall refer to her as ***“Ms. Solomon”*** or ***“the Employee.”***
- [3] Ms. Solomon commenced employment with Jewellers Warehouse on December 16, 1991 as a Sales Assistant. Essentially her duties included the sale of jewellery, watches and any other items which Jewellers Warehouse sold.
- [4] The performance of each Sales Assistant is measured by the achievement of certain sales targets. These targets are established by the Company.
- [5] Sue Ross is the Island Manager for the Employer. In her evidence she stated that the target varies for each employee. It takes into account the proven track record and demonstrated ability of each employee. Her target is set in Fort Lauderdale, in the United States of America. If her target is increased, then she is obliged to increase everyone else’s target. As the Island Manager, she indicated that she was not responsible for setting employees’ individual targets. This duty was executed by the Store Manager.
- [6] In answer to the Court however, Ms. Ross stated *inter alia* as follows:

“After Fort Lauderdale sets my targets then I set the employees’ targets. If Fort Lauderdale sets targets which are too high, then I would still set the local targets.”

- [7] By a letter dated January 20, 2003 Ms. Ross had occasion to write to Ms. Solomon. (It was admitted as **“SR -10.”**) It reads as follows:

“January 20th, 2003

Emily Solomon

Having updated the first Quarter of the Financial Year 2003 it is apparent that you fall far below the Company’s minimum requirement of 85% of your personal target.

For the year ended September 2002 your Annual percentage was the lowest in the store at 62% and for the first quarter of this year you only managed to achieve 45%.

Let this letter serve as a warning that should you not achieve the minimum requirement of 85% at the end of the second quarter (3 months) you will be terminated for poor performance per section C59 (5) of the Antigua and Barbuda Labour Code.

***Sue Ross
Island Manager***

cc: Mr. Hesketh Williams – Deputy Labour Commissioner”

Ms. Solomon received this letter on January 20, 2003.

- [8] Ms. Ross also produced a document which was ***entitled “Linelle Solomon Performance Tracking Sheet.”*** (It was admitted as **“SR-19.”**)

- [9] In the first warning letter dated January 20, 2003 (**“SR-10”**).

Ms. Ross referred to the year which ended 2002. Ms. Ross indicated that Ms. Solomon's *"annual percentage was the lowest in the store at 62% and for the first quarter of this year (2003 Ms. Solomon) only managed to achieve 45%"*.

[10] By a letter dated February 06, 2003 Ms. Ross wrote to Ms. Solomon. This second letter of warning concerned a period of Ms. Solomon's performance from January 01 to January 31, 2003. It was admitted into evidence as **"SR-12"**.

[11] (a) By a letter dated February 11, 2003 Ms. Ross wrote a letter to Ms. Solomon. In that letter Ms. Ross made a complaint of Ms. Solomon's late return to work after she had taken lunch. In Ms. Ross' estimation Ms. Solomon took more than 15 minutes over her allotted period for lunch. If this occurred again, she would be suspended for one day. This letter was admitted as **"SR-13."**

(b) It appears that Ms. Solomon did not accept the letter of February 11, 2003. It was left on Ms. Ross' desk. Ms. Ross wrote Ms. Solomon a letter dated February 13, 2003. In that letter she viewed Ms. Solomon's action as an act of ill-discipline. She informed Ms. Solomon that if this action occurred again, she would be suspended without pay *"until such time as the letter is accepted."* This letter was marked **"SR-14"**.

(c) Ms. Ross wrote another letter to Ms. Solomon. It is dated March 21, 2003. She had reason to complain of Ms. Solomon's *"extremely rude behaviour"* to her. She was suspended for one day. This letter was marked **"SR-16"**.

- [12] Ms. Ross wrote a third letter of warning to Ms. Solomon. It is dated March 11, 2003. It was admitted as “**SR-15.**” In that letter Ms. Ross referred to Ms. Solomon’s sales record for February 2003.
- [13] (a) By a letter dated April 03, 2003 Ms. Ross wrote to Ms. Solomon. No mention was made in this letter of Ms. Solomon’s performance for the month of March 2003. This letter was submitted into evidence as “**SR-17.**”
- (b) In “**SR-17**” Ms. Ross referred to Ms. Solomon’s “*general attitude to the job (which was) evidenced by the numerous warning letters on (her) file.*”
- (c) As a result of “*the above*” Ms. Solomon’s services were terminated in accordance with Section C59 (5) of the Antigua and Barbuda Labour Code (**afterwards called “the Labour Code”**) “*for poor performance with immediate effect.*”
- [14] Upon receipt of her letter of dismissal Ms. Solomon received a cheque which represented (a) wages for the last week worked, (b) commission and (c) vacation pay.
- [15] At the time of her dismissal Ms. Solomon stated that she worked for a weekly wage of \$391.50 together with an average weekly sales commission of \$200.00.

Mitigation efforts:

- [16] Ms. Solomon commenced efforts to find alternative employment. She wrote some letters to different entities. They included a letter to Cassava Enterprises dated April 08, 2003, one to Abbotts Jewellery dated April 23, 2003 and a letter to World Gaming dated April 30, 2003. The letters of application were referred to at **paragraph [15]** of her Witness Statement.
- [17] Ms. Solomon obtained employment with State Insurance Corporation from November 01, 2004. She earns income on a commission basis as a Sales Representative . For the period January 11, 2004 to November 30, 2005, she was given a monthly advance of \$2,000.00. For the same period, commission earned by her of \$6,419.15 was deducted from this advance. She presently receives an average of \$1,400.00 monthly.
- [18] Ms. Solomon commenced legal proceedings by filing a Reference and Employee's Memorandum both dated April 14, 2008. An Amended Employee's Memorandum was filed on August 20, 2008.
- [19] The Employer's Memorandum was filed on May 29, 2009. Its Witness Statement was filed on July 01, 2009. The Employee's Witness Statement was filed on July 28, 2009.

THE RELEVANT ISSUES

- [20] (i) **Whether the Employee's conduct complained of merited summary dismissal in accordance with Section 58 (1) (a) of the Labour Code.**
- (ii) **Whether the Employer's warning letters or letter of dismissal met the warning and notice of intended action in the event of repetition requirements in accordance with Section C59 (5) of the Labour Code.**
- (iii) **Whether the period from January 20, 2003 to April 03, 2003 was a reasonable duration of time for the Employee to demonstrate that she was able to perform her duties satisfactorily.**
- (iv) **Whether Jewellers Warehouse as a reasonable employer, honestly and reasonably believed that Ms. Solomon was incapable and had not demonstrated at the time of her dismissal that she was able to perform and had performed her duties in a satisfactory manner.**
- (v) **In the event that the Court holds that Ms. Solomon was unfairly dismissed, what is the measure of damages to which she is entitled.**

THE EMPLOYEE'S SUBMISSIONS

[21] Ms. Cherissa Roberts- Thomas, Attorney-at-Law of Marshall & Co. Attorneys-at-Law for the Employee made certain submissions. They may be summarised as follows:

- (i) In an assessment of the issues the Court should be guided by Section C58 (1) (b) and 59 (5) of the Labour Code respectively.
- (ii) The Court should apply the test which was adumbrated by **Husbands J A** in the Court of Appeal judgment entitled **David Lashley and Partners v Bayley (1992) 44 WIR 44** at **page 46 Letters g – j**. **Husbands JA** adopted the test which was stated in **Selwyn’s Law of Employment (6th Edition) paragraph [8-114]**.
- (iii) The Court should have regard to the **Eastern Caribbean Court of Appeal judgment in Civil Appeal No. 29 of 2004 Jewellers Warehouse v Cecile Norde**.
- (iv) The Employer must not rely upon performance prior to the written warning for the purpose of assessing the Employee’s improvement.
- (v) That the Employer took into consideration the period of the Employee’s performance from January 01, 2003 in an assessment of Ms. Solomon’s performance was *“unreasonable within the scheme of the dismissal of the Employee pursuant to C 59 (5).”*
- See paragraph [9] of her Written Submissions.
- (vi) “No evidence has been produced by the Employer detailing the improvement by the Employee for the remaining one third of January 2003, that is, post the written warning.”
- See paragraph [10] of her Written Submissions.

- (vii) The evidence does not disclose any grounds reasonable or otherwise for the Employer to dismiss the Employee for poor performance pursuant to Section C59 (5) of the Labour Code. The termination of the Employee was therefore unlawful , unreasonable and blatantly unfair.

- See paragraph [11] of her Written Submissions.

[22] The Employee is entitled to awards under the heading of

- (a) Loss of protection; (b) Immediate loss; and (c) Future loss.

The Employer's Submissions

[23] Dr. Dorsett Attorney-at-Law of Watt & Associates Attorneys-at-Law for the Employer made the following submissions. In summary they are as follows:

- (i) Sections 58 (1) (b) and C59 (5) respectively are the appropriate sections of the Labour Code which the Court should consider to determine the relevant issues.
- (ii) The reason assigned for the Employee's dismissal related to her incapability to achieve certain targets which were (1) a sales target; (2) a DFC target; (3) a NEW target. Another reason proffered for the Employee's dismissal was her ***"general attitude."***
- (iii) The Court should consider **Jewellers Warehouse v Norde** (op cit)
- (iv) ***"The warning letter of 20th January, 2003 clearly warned of the likelihood of termination if the employee failed to meet the minimum requirement of 85% of the sales target***

by the end of the second quarter (i.e. by the end of March 2003)."

According to Dr. Dorsett, this letter therefore met the warning and notice of intended action in the event of repetition requirements.

-See paragraph [14] of his Written Submissions.

- (v) The Employee's performance at the time of her dismissal *"based on a three month measure, ...demonstrated lack of sustained sufficient capability that made dismissal by the Employer a reasonable response."*

- See paragraph [16] of his Written Submissions.

- (vi) No hard and fast rule can be set for what is a *"reasonable time within the 3 month period."* The period from January 20, 2003 to April 03, 2003 (73 days) was reasonable.

- See paragraph [17] of his Written Submissions.

- (vii) The determination of whether or not the employee is competent is to be done during the period of three months following the receipt of the written warning. There is no need for the expiration of a three month period if there is a repeat of injurious or wrongful acts arising from incompetence.

- See paragraph [18] of Dr. Dorsett's Written Submissions.

- (viii) *"[T]he dismissal was not unfair in that it was reasonable in the circumstances and complied with C58 (1) (b) and C 59 (5) of the Antigua and Barbuda Labour Code."*

- See paragraph [8] of his Written Submissions.

- (ix) *“An employee cannot be said to be serving his employer faithfully and with due regard for his interests if service is rendered with a hostile, unbecoming or otherwise offensive attitude.”*

- See paragraph [5] of Dr. Dorsett’s Written Submissions.

THE LAW

[24] Section C56 of the Labour Code provides in summary that if an employee has completed a probationary period with an employer, he shall have the right not to be unfairly dismissed by the employer. In addition no employer shall dismiss any such employee without just cause.

[25] Section C58 (1) (a) of the Labour Code relates to *“misconduct of the employee on the job, within the limitations of section C59 (1) and (2).”*

[26] Section C58 (1) (b) of the Labour Code and the proviso to C58 (1) state as follows:

C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

“(a);

(b) relates to the capability or qualifications of the employee to perform work of the kind he was

employed to do, within the limitations of section C59 (5);

(c);

(d); or

(e)

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

[27] Section C59 (5) of the Labour Code states:

“Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in respect of which the warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee.”

[28] The interpretation of Section C58 (1) (b) and Section C59 (5) of the Labour Code arose to be considered in **Civil Appeal No. 29 of 2004, Jewellers Warehouse and Cecile Norde.**

[29] The salient facts are as follows Mrs. Cecile Norde was employed by Jewellers from 1989 to September 28, 2001. She obtained a promotion of Store Manager in November 1996. Ms. Sue Ross

was Jewellers Island Manager. Mrs. Norde was a subordinate of Ms. Sue Ross.

- [30] Mrs. Norde performed her duties very well. By letter dated September 28, 2001, Ms. Ross wrote Mrs. Norde a letter with regard to an incident which took place on September 25, 2001. Ms. Ross required “*An immediate improvement*” in order for Mrs. Norde to retain her position.
- [31] On October 24, 2001 the President of the Company visited the store. He requested Mrs. Norde to open the vault. She took “*in excess of ten minutes to use the combination.*” When the vault was opened “*an amount of jewellery was stored in the vault but was not represented in the showcases.*”
- [32] By a letter dated November 06, 2001 Ms. Ross dismissed Mrs. Norde. The reason given was her inability to manage the inventory. This was having an adverse effect on revenue.
- [33] Mrs. Norde commenced proceedings in the Industrial Court. She stated that she was unfairly dismissed. The Industrial Court held for her. Jewellers’ appealed this judgment. The Court of Appeal held for Jewellers.
- [34] **Rawlins, J.A.** (as he then was) wrote the judgment of the Court of Appeal. At **paragraphs [20] and [21]** of the judgment, **Rawlins J.A.** stated as follows:

“[20] When read with section C58 (1) (b) of the Code the requirements of section C59 (5) are mandatory in that

where incapability is given as the basis for termination, the requirements of section C59 (5) of the Code must be satisfied if a dismissal for incapability is to be encompassed “within the limitations of section 59 (5)”. The written warning must describe the nature of the incapability that is alleged. It must also state the action that the employer intends to take in the event of repetition. The action for which the employee is dismissed must be a repeat of the matter or matters complained of in the warning letter.

[21] As far as time requirement is concerned, section C59 (5) permits an employer to terminate the employment of an employee, if during the period of 3 months after receipt of the written warning, the employee does not demonstrate that he or she is able to perform and has performed his or her duties in a satisfactory manner. This, however, does not require an employer to await the expiration of the 3 months after the warning letter before issuing a termination letter in a case, for example, in which alleged injurious or wrongful acts by an employee are repeated.”

THE FIRST ISSUE

Whether the Employee’s conduct complained of merited summary dismissal in accordance with Section 58(1) (a) of the Labour Code?

[35] The law with respect to an analysis of an employee’s conduct which may warrant a summary dismissal has been set out in numerous textbooks and cases. I attempted to write on this subject in **Reference No. 38 of 2003 Nicole Potter and Jewellers**

Warehouse.

- [36] Essentially the misconduct complained of must undermine the relationship of trust and confidence sufficient to justify the instant dismissal of the employee.
- [37] The conduct featured in this case is referred to at **paragraph [11]** of this judgment. In addition, I have also made reference to it at **paragraph [23] (ix)** of this judgment.
- [38] I hold that the behaviour referred to at **paragraphs [11] and [23] (ix)** of this judgment does not constitute misconduct of such a quality, nature or kind which would justify a reasonable employer to summarily dismiss an employee. In the circumstances of this case I hold that there was no factual basis which warranted summary dismissal for misconduct.

THE SECOND ISSUE:

Whether the Employer's warning letters or letter of dismissal met the warning and notice of intended action in the event of repetition requirements in accordance with Section C59(5) of the Labour Code?

- [39] In **Jewellers Warehouse and Cecile Norde** (op cit) **Rawlins J.A.** (as he then was) stated at **paragraph [27]** as follows:

[27] "The reason for dismissal would be irrelevant, within the requirements of section C59 (5) of the Code, unless it was given in a prior letter issued no more than 3 months prior to the termination letter. Additionally, the prior letter

must have contained a warning and an indication of the consequences, including possible termination, if Mrs. Norde repeated the shortcomings which formed the bases for the reasons for the warning in the prior letter.....”

[40] The essence of what must be contained in the written warning is *“the unsatisfactory employment”* of which the Employer makes its complaint and *“the action the employer intends to take in the event of repetition.”*

- See C59 (5) of the Labour Code.

[41] The Court of Appeal held in the **Jewellers Warehouse** case that *“the central allegation contained in the warning letter was the essence of the reason that Jewellers gave for terminating Mrs. Norde’s employment.”*

- See paragraph [39] of the judgment.

[42] (i) The facts of this present case may be distinguished from those in the Jewellers’ case. The first letter of warning (SR-10) dated January 20, 2003 stated that Ms. Solomon’s *“Annual percentage was the lowest in the store at 62% and for the first quarter of this year she only managed to achieve 45%.”* Additionally the letter from Ms. Ross warned Ms. Solomon that should she *“not achieve the minimum requirement of 85% at the end of the second quarter (3 months) (she) will be terminated for poor performance per section C 59 (5) of the Antigua & Barbuda Labour Code.”*

- (ii) Ms. Solomon's Performance Tracking Sheet "SR-19" contains the reference to *"the unsatisfactory employment in respect of which the written warning is given"* namely the 45% statistic referred to in "SR-10". In "SR-19", the mention of 44.80% or 45 % refers specifically to one target. This is the Employee's sales target.
 - (iii) No reference was made in "SR- 10" of any unsatisfactory employment record as it related to a DFC or NEW target which Ms. Solomon was required to achieve.
- [43] (i) The second letter of warning is dated February 06, 2003. It is "SR-12". Ms. Ross in that letter made reference to Ms. Solomon's *"sales performance for the month of January (2003 which) shows that (she) clearly (fell) short of any acceptable performance at 14% of target."*
- (ii) Ms. Ross referred to her letter of January 20, 2003 and warned Ms. Solomon that if she *"cannot achieve the Company's minimum standard of 85% within three months (she) will be terminated for poor performance."*
 - (iii) A perusal of "SR-19" shows that the *"14% of target"* referred to in "SR-12" refers specifically to Ms. Solomon's Sales Target. In summary a sales target of \$11,000.00 was set for Ms. Solomon to achieve. She sold \$1,531.44 in merchandise. "SR-12" contained no mention of any DFC or NEW Targets which Ms. Solomon was required to achieve.

- [44] (a) The third letter of warning is dated March 11, 2003. It was written by Ms. Ross to Ms. Solomon. It was admitted as “**SR-15**”. In that letter Ms. Ross informed Ms. Solomon that the company had now *“updated the sales performance for the month of February (2003 and) it shows that (she) clearly fall short of any sort of acceptable performance at 75% of target”*.
- (b) Ms. Ross referred Ms. Solomon to the letter of January 20, 2003 (“**SR-10**”). She reminded her that if she could not *“achieve the company’s minimum standard of 85% within three months (she) will be terminated for poor performance.”*
- (c) An analysis of “**SR-19**” reveals that Ms. Solomon was set a Sales Target. On this occasion it was \$6,400.00. She actually sold \$4,780.44 or 74.69 (75%) of her Sales Target. This is the same *“75% of target”* which Ms. Ross referred to in the third warning letter (“**SR-15**”).
- (d) There is no mention in “**SR-15**” of any requirement by the Company for Ms. Solomon to achieve a DFC or NEW target.

[45] The letter of dismissal is dated April 03, 2003. It reads as follows:

“April 3rd 2003

Linelle Solomon

Having updated the sales records for March 2003 it is apparent that despite many warnings (letters of January 20th 2003) February 6th

2003 and March 11th 2003) that your performance was far below a satisfactory level for the quarter and not up to the minimum required by the Company.

For the three months just ended you achieved 53.81% sales targets, 8% of DFC target and 9% of N.E.W. target. For the half year just concluded you achieved 49% of sales targets, 5% of DFC target and 38% of N.E.W. target which is completely unsatisfactory by Company standards.

In addition to the above your general attitude to the job has not helped as is evidenced by the numerous warning letters on your file.

As a result of the above, your services are therefore terminated section C59 (5) for poor performance with immediate effect.

Find enclosed a cheque to cover your work week this week plus 20 days of vacation pay owed to you along with any commissions earned.

*Sue Ross
Island Manager”*

[46] A reading of Ms. Solomon’s Witness Statement reveals that she was made aware of a requirement to achieve *“sales targets on a monthly basis for each Employee to attempt to attain.”*

- See paragraph [5].

[47] At paragraph [6] of her Witness Statement Ms. Solomon stated as follows:

“In the course of assessing performance the Employer would set the sales targets on a monthly basis for each Employee to attempt to attain. A notice of the targets for each month would usually be placed in the Manager’s Office so that employees are aware of their aim that month. Additionally, the amount of sales made in the previous month by each employee was posted to inform employees of their performance. I had my good months when I would

exceed to meet the minimum requirements as did all Employers during this period.”

[48] Ms. Solomon in her evidence to the Court when being cross-examined did indicate that she was aware that there were three (3) targets. She identified them as the Sales Target, the D F C Target and the N E W Target. She further informed the Court that she did not recall what these targets were.

[49] (a) Ms. Sue Ross in her Witness Statement stated as follows:-

“The company has three measures of performance. The first measure is the sales target. The second target is the DFC target..... The third performance measure is the NEW target”.

(b) The DFC target refers to the performance of the employee with respect to a private label credit card. According to Ms. Ross employees are expected to promote and generate sales when customers use the Duty Free Caribbean Credit Card.

(c) Ms. Ross stated that the NEW target refers to ***“a product protection (programme) that sales staff are expected to promote to customers.”***

[50] For the very first time the letter of dismissal dated April 03, 2003 introduces a DFC target and a NEW target. These two targets were never referred to in the letters of warning to Ms. Solomon dated January 20, February 06 or March 11, 2003. The non-achievement

of the D F C and the N E W targets by Ms. Solomon formed a basis of her dismissal.

[51] If the Employer required Ms. Solomon to achieve a specific percentage of the D F C and the N E W Targets it should have specifically included them in the warning letters of January 20, February 06 and March 11, 2003. This was required in accordance with Section C59 (5) of the Labour Code. The Employer's non-inclusion of these targets in the said letters was unfair to Ms. Solomon.

- [52] (i) As the Employer's letters of warning did not contain any requirements for Ms. Solomon to achieve any other target than a Sales Target, I hold that in this respect, they did not meet the warning and notice of intended action in the event of repetition requirements in accordance with Section C59 (5) of the Labour Code.
- (ii) In case that I am wrong, I am still required to decide the following issue.

THE THIRD ISSUE

Whether the period from January 20, 2003 to April 03, 2003 was a reasonable duration of time for the Employee to demonstrate that she was able to perform her duties satisfactorily.

[53] There is an erroneous comparison by Dr. Dorsett of the facts in the Norde case (op cit) with the facts in this case. At **paragraph [17]** of his Written Submissions he states:

“The employee in the instant reference was given 73 days (from 20th January 2003 to 3rd April 2003). Whereas in Norde the employee was given at most 66 days (from the September 2001 letter (issued at the earliest on 1st September) to 6th November 2001).”

- [54] (i) Where I differ from Dr. Dorsett is that the September 2001 letter which he refers to in the Norde case as being *“issued at the earliest on 1st September”* was dated September 28, 2001.
- (ii) The letter referred to a major infraction which took place a mere three (3) days before it was written.
- (iv) It was therefore very appropriate for the Court of Appeal to deem the period to be reasonable in the Norde case as the Employer took speedy action to bring Mrs. Norde’s action to her attention.
- (iv) From three (3) days after the incident, time became of the essence for Mrs. Norde to make an *“immediate improvement.”*
- [55] (i) Where I also differ from Dr. Dorsett is that in Norde’s case the Court of Appeal was correct to take into consideration (a) the incident of September 25, 2001 and (b) the incident of October 24, 2001.
- (ii) In this case whilst Dr. Dorsett submits that *“the time afforded by the same employer in the reference at bar was no less reasonable (than) the time afforded in Norde,”* the

period during which he requests this Court to consider as a part of the three month period took place nineteen (19) days prior to January 20, 2003.

[56] Even Ms. Ross was forced to concede in answer to Ms. Cherissa Roberts-Thomas as follows:

“It was the month of January 2003 that resulted in her target falling below 85% for that quarter. I would agree that the month of January 2003 was already three quarters gone by the date of the first warning letter.....”

[57] No evidence was led by the Employer which chronicled the Employee’s performance between January 20 and 31, 2003.

- [58] (i) I hold that the period between January 20, 2003 and April 03, 2003 was a reasonable period for Ms. Solomon to demonstrate that she was able to perform her duties satisfactorily.
- (ii) I also hold that the period between January 01 and January 20, 2003 must be excluded from an analysis of her performance as Ms. Solomon was not informed within a reasonable time that her performance would have been judged for the purpose of Section C59 (5) of the Labour Code.
- (iii) A more rational and reasonable way to interpret Ms. Solomon’s performance is to find the average of the months of February and March 2003.

[59] It is clear that after Ms. Solomon was presented with the first warning letter dated January 20, 2003, her performance improved to 75%.

[60] In the month of March 2003 the Employee's Sales Target of \$6,400.00 was surpassed by \$94.25. She achieved 101% of the Sales Target.

THE FOURTH ISSUE

Whether Jewellers Warehouse as a reasonable employer honestly and reasonably believed that Ms. Solomon was incapable and had not demonstrated at the time of her dismissal that she was able to perform and had performed her duties in a satisfactory manner.

[61] No fetter should be placed upon employers who seek to manage their business affairs. They are entitled to demand of their employees the highest standards of performance. Whether or not an employee is performing to the best of his ability is a question of fact to be determined based upon the circumstances of each individual case. The test to be applied is subjective.

[62] The test was referred to by **Husbands J. A. in David Lashley and Partners v Bayley (1992) 44 WIR 444 at page 46.** It was also utilised by **Rawlins J.A. in the Norde judgment (op cit).** It is set out in **Selwyn's Law of Employment (6th Edition) at paragraph 8-114.** The test is as follows:

“If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent....In other words, the test ...is a subjective one...it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent.”

- [63] (i) The same test is applicable to determine, on the basis of section C59 (5) of the Labour Code, *“whether an employee has demonstrated that he or she is able to and has performed in a satisfactory manner.”*

- See Rawlins J.A. in Norde at paragraph [35].

- (ii) Ms. Solomon would be required to show that Jewellers Warehouse was unreasonable to dismiss her on April 03, 2003.

- [64] (a) The evidence discloses that the allegations of poor performance with regard to D F C and N E W targets were never contained in any of the respective letters of warning, written by the Employer to the Employee.

(b) It was the Employer’s duty to *“describe the unsatisfactory employment”* of the Employee in the letters of warning. This action would have afforded the Employee

an opportunity to improve. In the event that there was a repetition of such unsatisfactory employment the Employer may have been justified in dismissing the Employee in circumstances where she was given a reasonable period of time during a three month interval.

[65] I hold that Jewellers Warehouse as a reasonable employer could not have honestly and reasonably believed that Ms. Solomon was incapable and had not demonstrated at the time when it dismissed her that she was able to perform and had performed her duties satisfactorily.

[66] In all of the circumstances of this case I hold that the Employer's dismissal of the Employee was unfair.

THE FIFTH ISSUE

In the event that the Court holds that Ms. Solomon was unfairly dismissed what is the measure of damages to which she is entitled?

[67] An employee who is unfairly dismissed may be entitled to certain awards under specific headings.

(a) Basic Award

Under this heading the award represents one day's pay for each month of her term of employment. She worked for 136 months. Her entitlement is as follows
 $(\$591.50 \div 6) \times 136$ or **\$13,407.33**

(b) **Immediate Loss**

Ms. Solomon commenced employment in November 2004. She was unemployed for about 17 months. A period of six months loss of earnings would suffice to award her under this heading. This amounts to $(\$591.50) \times 52 \div 12$ or $\$2563.16 \times 6$ which is **\$15,378.99.**

(c) **Future Loss**

The Employee earns an average commission of \$1,400 per month. She used to earn $(\$591.50 \times 52 \div 12)$ or \$2,563.16 per month. If a deduction of \$1,400.00 is made this results in a loss of \$1,163.16. A loss of five months is sufficient to award the Employee. When a 15% discount is deducted, the sum arrived at is **\$4,943.43.**

[68] The Employer shall pay the Employee **\$33,729.75** on or before **April 30, 2010**. There shall be no order as to costs.

