

Original

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 16 OF 2010

BETWEEN

RONDA SARGEANT

Employee

and

MINISTRY OF FINANCE

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. St. Lawrence Defreitas

Member

Appearances:

Mr. Leon Symister-Attorney-at-Law - for the Employee

Ms. Bridget Nelson-Attorney General's Chambers-for the Employer

2012: April 11

September 24

JUDGMENT

PILGRIM, P.

Background

[1] Section 3(1) of the Industrial Court Act Cap.214 of the Laws of Antigua & Barbuda states as follows:

“3(1) This Act shall be binding on the Government as the employer of its non-established employees but not as the employer of its other employees”.

- [2] The Ministry of Finance, the Economy and Public Administration (now the Ministry of Finance and the Economy and afterwards called “*the Ministry of Finance*”) is a department of the Government of Antigua & Barbuda. On some occasions as the situation so warrants, the Ministry of Finance engages in contracts of employment with individuals who become non-established employees.
- [3] In 2006 Ronda Sargeant resided in Toronto, Canada. She is the holder of a Bachelor of Commerce degree. In addition she has acquired some certificates in financial management. She gave evidence that she has experience in taxation. She was gainfully employed in Canada.
- [4] Whilst residing in Canada in 2006, Ms. Sargeant engaged in discussions with Mr. Lenworth Johnson the then Parliamentary Secretary of the Ministry of Finance. As a consequence of those discussions Mr. Johnson forwarded a letter of an offer of a contract of employment to Ms. Sargeant.
- [5](a) In that letter Mr. Johnson stated inter alia that the position which was made available to her was that of Tax Auditor and that she would be paid EC \$ 10,500.00 per month. The monthly salary would be comprised as follows:
- | | |
|----------------------|--------------------|
| Salary | \$8,100.00 |
| Duty Allowance | \$ 700.00 |
| Travelling Allowance | \$ 500.00 |
| Housing Allowance | <u>\$ 1,200.00</u> |
| | <u>\$10,500.00</u> |

(b) The duration of the contract was three (3) years, gratuity payable was 12.5% of aggregate salary and the contract was terminable by three (3) months notice on either side. That letter was dated December 08, 2006. (It was marked “**EM-1**”).

[6] Ms. Sargeant duly commenced her employment with the Inland Revenue Department [IRD] on July 02, 2007. In her evidence she stated that she received both letters dated December 08, 2006 and July 17, 2007. In the letter dated July 17, 2007 it stated inter alia as follows:

“Your duties will be assigned by the Permanent Secretary, the Head of the Department or anyone to whom the authority is delegated”.

[7] The Permanent Secretary of the Ministry of Finance by letter dated July 17, 2007 wrote to Ms. Sargeant. In that letter the terms of the contract as outlined at paragraph 5 above were repeated. In addition, the offer of employment with the IRD was effective from July 02, 2007. As well, Ms. Sargeant would be subject to Government Regulations, Statutory Instruments and Subsidiary Legislation in force from time to time and any existing agreement between the Union and Government of Antigua and Barbuda. This letter was marked “**EM-2**”.

[8] A draft contract of employment in accordance with EM-2 was forwarded to Ms. Sargeant sometime in August of 2007. The Employee refused to sign it because it did not allow her to work “*at the management level with supervisory authority*”.

-see Ms. Sargeant’s letter to Ms. Lee dated February 14, 2008 (DL-2).

- [9] Ms. Sargeant stated that she agreed with all of the terms of the draft contract which were mentioned in “**EM-1**” and “**EM-2**”. The only term of the contract which she refused to agree with was that which dealt with her “*level of responsibility*”.
- [10] By letter dated July 31, 2009 the Permanent Secretary of the Ministry of Finance wrote to the Employee and terminated the contract between the two parties “*with effect from 1 August, 2009*”. In that letter the Permanent Secretary also stated as follows: “*You will receive three (3) months payment in lieu of termination notice*”. (This letter was marked “**EM-4**”).
- [11] As a consequence of the termination of the contract between the Employee and the Employer the Employee commenced legal proceedings against the Employer by filing a Reference in this Court. In that Reference the Employee claims that she was unfairly dismissed.
- [12] The Employee’s Memorandum and her Witness Statement were filed on January 20, 2011. The Employer’s Memorandum and its Witness Statements were filed on October 06, 2011.

The Issues

The issues to be determined are as follows:

- (I) Was the Employee dismissed fairly or unfairly?**
- (II) Did the Employer act reasonably or unreasonably in treating the reasons for dismissal as sufficient for dismissing the Employee?**
- (III) If the Employee was unfairly dismissed what is the measure of damages to which she is entitled?**

The Employee's Submissions

[13] Written Submissions on behalf of the Employee were filed on May 01, 2012. In his Written Submissions Mr. Symister, Attorney-at-Law for the Employee, stated *inter alia* as follows:

“There is no question that the employer and employee entered into a legally binding contract, an offer being made and accepted and consideration being agreed upon. There is no issue either that the parties agreed with all of the provisions of the contract except the provisions dealing with duties and responsibilities”.

[14] Mr. Symister also submits that there were no grounds to summarily dismiss the Employee. He states that in the circumstances of this case the Employer should have warned the Employee of her non-performance of certain tasks which were assigned to her as provided for in accordance with Section C59 (3) of the Antigua & Barbuda Labour Code (the Labour Code). As a consequence of the Employer's failure to follow the procedure in Section C59 (3) of the Labour Code, the termination of the Employee's contract of employment was unfair.

[15] Mr. Symister cited the **Eastern Caribbean Supreme Court case of The Epicurean Limited and Madeline Taylor Civil Appeal No.4 of 2003** which outlined the four distinct heads of damages which are available to an employee who is held to be unfairly dismissed.

[16] Mr. Symister also cited **Premier Beverage Limited v Edmeade Joyce Claim No. 266 of 2006**, a decision of the High Court of Antigua & Barbuda as an authority to show how a contractual provision should be interpreted.

Accordingly, Mr. Symister states that the contract between the two parties should be interpreted in such a manner that ***“where the contract is found to have been properly terminated that she is nonetheless entitled to vacation pay totalling \$7,190.00.***

Further, she is entitled to her gratuity representing 25 months she worked. The gratuity however; should be paid only on the basic salary of \$8,100.00 in the amount of \$25,312.50”.

- [17] In addition Mr. Symister submits that the Employee is entitled to an award of \$146,000.00 for immediate loss of earnings. As well, learned Counsel for the Employee asserts that Ms. Sargeant should be awarded three (3) months salary (\$24,300.00) for future loss of earnings, an award for manner of dismissal and \$7,190.00 for vacation pay. According to Mr. Symister the Employer should be asked to pay the Employee's costs.

- [18] Ms. Bridget Nelson's Written Submissions were filed on April 27, 2012. Learned Counsel for the Employer submits *inter alia* as follows:

“...Ms. Sargeant did practically no work between 2nd February 2008 and 31st July 2009. Ms. Sargeant decided that she was not doing any work that was not managerial in nature. Her neglect and blatant refusal to perform the tasks assigned to her by the Commissioner of Inland Revenue justified the termination of her employment under (Section C59 (1) of the Labour Code)”.

- [19] Learned Counsel for the Employer also made the following submissions:

“Ms. Sargeant refused to discharge her duties as tax auditor and made it pellucid that she was not going to perform any functions

that were not managerial in nature. Ms. Sargeant misconducted herself by failing to obey the instructions of the Commissioner with regard to the files that she gave her for assessment of income tax. It is therefore evident that the employment relationship could not be expected to continue and pursuant to (Section) C59 (1) (a) of the Labour Code the Employer was justified in terminating Ms. Sargeant's employment without notice in accordance with the Labour Code".

[20] Ms. Nelson also submits as follows:

"It is submitted that Ms. Sargeant was not unfairly dismissed within the meaning of the Antigua & Barbuda Labour Code....Although she was not entitled to payment of three months notice her Employer chose to pay her nevertheless. It is submitted that since Ms. Sargeant was not unfairly dismissed she was not entitled to any compensation for unfair dismissal under the heads claimed".

[21] Ms. Nelson cited **Elphina Abraham and Sunny Caribbee Herbal and Spices Company Limited No. 122 of 2007**, a decision of the High Court of the British Virgin Islands (2010), and the Privy Council case of **Evelyn Henry v Mount Gay Distilleries Ltd. No. 43 of 1998** in support of her submissions.

[22] Learned Counsel for the Employer also submits that the Employee is not entitled to an award for payment in lieu of vacation as this claim does not appear in her Employee's Submissions or Witness Statement. Ms. Nelson also stated that Ms. Sargeant *"is not entitled to be paid vacation that would*

have accumulated after 31st July 2009 had her services not been terminated since clause 8 of the contract provides “vacation leave shall be enjoyed within the life of the contract.”

[23] Ms. Nelson also submits as follows:

“She had proceeded on vacation leave prior to receiving a response as to whether it was approved or denied. As events turned out on her return from vacation leave she learnt that it had been denied since she had not signed her contract and there were several outstanding files that she had not completed”.

[24] The Employer’s Counsel made the submission that the Employee is not entitled to a payment of gratuity. It is Counsel’s submission that the Employee’s actions constituted misconduct which disentitled the Employee from such an award being made to her. In all of the circumstances of this case learned Counsel contends that *“the employment relationship could not reasonably be expected to take any course other than termination”.*

The law

[25] Section C56 of the Labour Code states as follows:

“C56 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 such employee without just cause.”

[26] Section C58 (1) (a) and (2) of the Labour Code reads as follows:

“C58 (i) - 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.”

Section C58 (2) states as follows:

“(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 he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be whether the actual circumstances which existed, if known to the employer would have reasonably led to the employee’s dismissal.”

[27] C58 (1) must be read in conjunction with Section C59 (1). C59 1 (a) states as follows:

“C59 (1) – An employer may terminate the employment of an employee where the employee has been guilty of misconduct in 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)”

[28] **Harvey on Industrial Relations and Employment Law” (Harvey’s) Volume 1, 2008 at Chapter 9, page D1/851** under the heading “**MISCONDUCT**” states *inter alia* as follows:

“Dismissals for misconduct are perhaps the most frequent cases heard in tribunals....”

[29](a) What is the degree of misconduct which is necessary for the Employer to be able to comply with Section C58 1(a) of the Labour Code? In **Clouston & Co. Ltd. v Corry (1906) A.C. 122 Lord James** in delivering the judgment of the Privy Council stated *inter alia* at **page 129** as follows:

“There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.

.....In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts and is a question of fact”.

(b) “the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract”.

-per Lord Coleridge CJ in *Freeth v Burr* (1874) LR 9 CP.208 at 213.

[30] Under the heading entitled “**The Scope of Misconduct**” the learned authors of Harvey (op cit) state *inter alia* as follows:

“Dismissals relating to the conduct of the employee cover a very wide range of potential wrongs. They can be classified in a number of ways, but perhaps it is most useful to consider them in four distinct categories;

(1) a refusal to obey a lawful and reasonable order of the employer;

(2).....

(3).....

(4).....”

[31] (i) Harvey’s (op cit) at **paragraph [1355]** under the heading “**Refusal to obey a lawful order**” state *inter alia* as follows:

“It is a general principle underlying a contract of employment that the employee must obey the lawful and reasonable orders of the employer. Usually the question of whether the order is lawful or not depends upon whether it is in accordance with the contract of employment. If it is, then the employee is generally committing an act of misconduct in refusing to comply with it; if it is not, then the employer is again in breach of contract in seeking to compel the employee to do something which he is not lawfully entitled to require him to do”.

- (ii) The learned authors of **Harvey** (op cit) at **paragraph [1356]** continue to state as follows:

“Before looking at the operation of these principles, a number of qualifications need to be made. First, even if the employee is committing misconduct by refusing to obey the order this act of misconduct is not necessarily sufficiently grave to justify the employer adopting dismissal as the sanction.....Third, the refusal to co-operate or comply with the order must stem from some element of fault by the employee rather than anyone else...”

- (iii) Under the heading **“The significance of the contract”**, the learned authors of **Harvey** (op cit) at **paragraph [1327]** state *inter alia* as follows:

“Reference will have to be made to the contract of employment in determining the scope of the employer’s powers. Questions such as what jobs the employee can be required to do, where he can be required to work,....can be answered only by looking at the contract of employment.”

- (iv) At **paragraph [1358]** of **Harvey** (op cit) the learned authors state *inter alia* as follows:

“Examples of a refusal to obey a lawful order can themselves be considered under two headings. First there are cases where the employee has simply failed to perform his usual duties; and second, those where he has refused to obey some new instruction, perhaps involving doing different work or working in a new place, which is nevertheless within the terms of his contract”.

- [32] In **Cable & Wireless v Hill & Others (1982) 30 W.I.R. 120**, at **page 129**, **Berridge J.A** describes the evidence which is necessary to justify a summary dismissal as *“cogent and weighty in nature and content”*.

The First Issue

Was the Employee dismissed fairly or unfairly?

The Employee’s Evidence

- [33] The Employee in her Witness Statement at **paragraph [3]** stated as follows:
- “That in early 2007 while residing in Canada **I was offered and I accepted an offer of employment from the government of Antigua & Barbuda** and commenced working at the Inland Revenue Department (IRD), on July 2, 2007.” (The emphasis is mine).
- [34] This offer and acceptance referred to at **paragraph [32]** above related to the offer made by Mr. Lenworth Johnson of the Ministry of Finance in his letter to Ms. Sargeant dated December 08, 2006. The position specifically offered to Ms. Sargeant and which she accepted was that of **Tax Auditor**.
- [35] In answer to Mr. Symister, her Attorney-at-Law, Ms. Sargeant stated that she held discussions with Ms. Doleen Lee the then Permanent Secretary in the Ministry of Finance, Dr. Errol Cort the then Minister of Finance, Ms. Hyacinth Bailey the then acting Commissioner of the IRD and Mr. Lenworth Johnson. According to Ms. Sargeant there was an agreement by the parties to **“change the contract”**.

[36] Ms. Sargeant stated that a draft contract of employment was presented to her *“sometime in August of 2007. Upon examining the contract (she) immediately recognised that the contract did not match in words the discussions (which she) had with Mr. Johnson in terms of the position title, duties and responsibilities.”*

-see paragraph [6] of her Witness Statement.

[37] In answer to Mr. Symister, her Attorney-at-Law, Ms. Sargeant stated that *“this draft did not include a provision that reflected anything managerial which were tasks which (she) performed”*. According to Ms. Sargeant she *“disagreed with the duties stated at section 3 pages 2-4 of the draft contract of employment. (She) disagreed because these were not managerial functions.”* She agreed with all of the other terms of the draft contract of employment. Such terms according to her *“properly governed the relationship between the Employer and (herself).”*

[38] The draft contract of employment to which both parties have made reference to in this matter was presented to the Court. Clause 1 of it's draft referred to the position of *“Tax Auditor” within the Inland Revenue Department, Ministry of Finance and the Economy for a period of three (3) years with effect from the 2nd day of July, 2007 until the 1st day of July 2010 or until this contract of employment shall be sooner determined as hereinafter provided”*.

[39] Section 3 at **pages 2-4** of the draft contract contains a variety of duties which the Tax Auditor is expected to perform. Some of those duties are as follows:

1. *“Perform on site and off site audits of individuals, medium and large businesses and verify and reconcile transactions in books of accounts, financial statements and tax returns by:*

(a) examining balance sheets, income and expenditure statements, profit and loss accounts, and ABST accounts to determine the correctness of assessable income and tax payable;

(b) examining expense claims and allowances and tax invoices to verify the validity of same;

(c) examining trade accounts to determine sales, verify inventories and gross profit ratios;

(d) requesting information from appropriate sources to verify items claimed in accounts and financial statements.

2. *Audit the returns of individuals by :*

(a) contacting taxpayers by telephone or letter to obtain individual additional information;

(b) reviewing accounts details and analyzing compliance with legislation;

(c)

(d)

(e)

3. *Perform offsite audits on medium and large sized businesses to verify and reconcile transactions in books of accounts and financial statements of tax returns by:*

(a) examining books and records of taxpayers at their place of business;

(b) interviewing taxpayers for clarification or adjustments in accounts or financial statements for the purpose of obtaining additional information;

(c)

(d)

4. Maintain data in the computer system and finalize audit cases by:

(a) assessing cases assigned from the system prior to examination;

(b)

(c) preparing audit reports to the Commissioner of Inland Revenue.

5. The officer may be called upon, from time to time, to perform any other duties not identified in the job description but are relevant to the administration of the Antigua & Barbuda Sales Tax Act”.

[40] Clause 8 of the draft contract of employment deals with **LEAVE**. In summary Ms. Sargeant was eligible for “*vacation leave at the rate of twenty-seven (27) working days per annum and in accordance with existing Regulations*”.

[41] The matter of gratuity is dealt with at Clause 9 of the draft contract. It states as follows:

GRATUITY

- (1) “Upon the satisfactory completion of this contract of employment, the Officer will be eligible for a gratuity at the rate of twelve and a half percent (12 ½ %) of the amount of aggregate salary drawn during the term of this contract inclusive of any period of approved vacation leave.*
- (2) The Officer shall only receive gratuity on the proportionate part of the period of this contract that has been served by him in the following instances.*
- (i) where the Government terminates the contract for reasons other than misconduct on the part of the Officer;*
 - (ii) where the Officer terminates the Contract for reasons of ill health;*
 - (iii) where the Contract is terminated due to the death of the Officer;*
 - (iv) where the Officer terminates the Contract by giving the appropriate notice required under the terms of this contract of employment.”*

[42] The matter of Termination of the contract is contained at Clause 10. It states as follows:

“TERMINATION AND OTHER CONDITIONS OF EMPLOYMENT

- (1) If at anytime during the continuance of this employment, the Officer shall:-*
- (a) neglect or refuse or become unable from any cause (other than ill health) under this Agreement or to comply with any order given by or on behalf of the Government; or*
 - (b) disclose without lawful authority, any information respecting the affairs of the Government to any authorized person; or*

(c) in any manner misconduct herself so as to bring the Civil Service to disrepute the Government may terminate this contract of employment forthwith and thereupon all rights and advantages reserved to her by this Agreement shall cease.

(2) (a) The Government may, at any time, terminate this employment by giving the Officer three months notice in writing or by paying her three (3) month's salary in lieu of such notice.

(b) The Officer may, at any time after the expiration of three (3) months from the commencement of this employment terminate this employment by giving to the Government three (3) months notice in writing or by paying to the Government three (3) month's salary in lieu of such notice.

(c) The officer, in terminating this employment otherwise than in accordance with this Agreement, shall be liable to pay to the Government three (3) months salary as liquidated damages”.

[43] Ms. Sargeant stated in her evidence to this Court that she worked at the IRD every day for the two (2) year period between 2007 and 2009. During this period Ms. Bailey the IRD Commissioner assigned her tasks to be performed.

[44] Between July to September 2007 certain files were assigned to her by Ms. Bailey. According to Ms. Sargeant she became the Manager/Team Leader of the Corporate Tax Section at the IRD between September 2007 and February 2008. Her duties included assigning work to employees whose performance was assessed by her.

[45] In her Witness Statement Ms. Sargeant stated at **paragraphs [9] and [10]** as follows:

“9.From this moment forward, there began some level of discord and it was evident that the Commissioner of the Inland Revenue Department, Ms Hyacinth Bailey was not supportive of my presence and my position at the Inland Revenue Department.

10.Eventually, on February 4th, 2008, Ms. Bailey without providing me with any explanation removed all of my then assigned functions and had relegated me to the lower, junior echelons of the IRD”.

[46] Ms. Sargeant also gave evidence that she was never told that she was not performing according to the draft contract. It is her evidence that there was no occasion when she failed to complete any assignment which was given to her by the Commissioner of the IRD.

[47] In answer to Mr. Symister her Attorney-at-Law, Ms. Sargeant stated that she did discuss with Mr. Johnson the need to raise the level of management at the IRD and that an elite team ***“was necessary to be created at the IRD”.***

[48] In her evidence Ms. Sargeant stated that she received a cheque for \$18,000.00 after her dismissal.

[49] In answer to Ms. Bridget Nelson learned Counsel for the Ministry of Finance Ms. Sargeant stated *inter alia* as follows:

“Mr. Johnson did not go into any specifics of the duties which I was required to perform. Mr. Johnson did not offer me a specific

position to work at the Inland Revenue Department other than that of Tax Auditor”.

[50] In further answer to Ms. Nelson, Ms. Sargeant stated that she did not present any proof of ownership of a vehicle so that she would become qualified to claim a travel allowance. It is conceded by her Attorney-at-Law in his Written Submissions that Ms. Sargeant *“is not entitled to the transportation allowance not having shown during the contract period that she owned or maintain a vehicle”.*

-see page 8 of Counsel’s Submissions.

[51] Ms. Sargeant denied Ms. Nelson’s suggestion that on September 16, 2008 Ms. Bailey the acting Inland Revenue Commissioner attempted to discuss the status of certain files with her.

[52] Ms. Sargeant also stated at **paragraph [12]** of her Witness Statement as follows:

“I was not invited to participate in a meeting that was held with representatives of the International Monetary Fund (IMF), when they conducted a fact finding mission at the Inland Revenue Department, in order to help make recommendations to the Ministry of Finance. Everyone else in the Audit section had been so invited.”

[53] Ms. Sargeant agreed with Ms. Nelson that after February 2008, certain banking and corporate files were her responsibility for which she performed some work on them which led to assessments.

[54] Ms. Nelson Attorney-at-Law for the Employer put to Ms. Sargeant that three (3) months salary amounted to \$ 24,300.00. In addition learned Counsel suggested to Ms. Sargeant that certain statutory deductions must be made from that figure. To this suggestion Ms. Sargeant agreed. After a subtraction of those deductions the net figure which was payable to Ms. Sargeant was \$18,757.84 Ms. Sargeant disagreed with learned Counsel that she is required to sign a contract to be eligible for a payment of gratuity.

The Employer's Evidence

[55] Mr. Lensworth Johnson gave evidence. He resides at Paynters in St. Johns. He was the Parliamentary Secretary in the Ministry of Finance from March 2004 to March 2009. His Witness Statement is dated August 31, 2011. The contents of it are true.

[56] Mr. Johnson established in his Witness Statement the background to the position of Tax Auditor which he offered to Ms. Sargeant. **Paragraphs [2-7]** of his Witness Statement read as follows:

“2. In November 2006 the Ministry of Finance urgently wanted local auditors at the Inland Revenue Department (IRD) to take over the conduct of high level audits from the expatriate firm Lawrence May and Associates, which firm functioned as the Tax Compliance Unit. This unit collaborated with but operated independently of the IRD. The contract of Lawrence May and Associates was about to expire on 15th January 2007. Prior to this the Ministry had also seen the need to raise the level of efficiency and management of the IRD, particularly to

administer Personal Income Tax and the upcoming Antigua and Barbuda Sales Tax (ABST).

3. *With these goals in mind I reviewed the job application files in the Ministry and held discussions by telephone with a number of qualified Antiguan residents overseas including Ronda Sargeant. The discussions were preliminary and general, informing them of the overall objectives of the Ministry. I could not and did not make any specific offers. Subsequent to my discussions the Ministry obtained on 7th November 2006 Cabinet approval in principle to enter into contract negotiations with these Antiguan residents for the position of Tax Auditor within certain parameters (terms and conditions). Tax Auditor could perform the tax compliance role or management role or both.*
4. *However the urgency was to employ Antiguan auditors at IRD capable of taking over from Lawrence May and Associates quickly i.e. the tax compliance role. Indeed Cabinet had agreed in principle to extend the contract of Lawrence May and Associates for only six months. Accordingly I held contract negotiations with Ms. Sargeant by telephone with regard to the position of Tax Auditor performing the tax compliance function. I never discussed with her any appointment as manager in the IRD. On 5th December 2006 the Ministry obtained Cabinet approval for salaries,*

allowances and other benefits for the proposed employees including Ms. Sargeant.

5. *Following the Cabinet decision dated 5th December 2006 I sent a letter to Ms. Sargeant dated 8th December, 2006 informing her of Government's offer of the position of Tax Auditor. I could not and did not lead her to believe or give her any assurances that she would be appointed to a management position since I had no authority to make any such appointment. Nor did I hold out to Ms. Sargeant that I had authority to assign her duties and responsibilities.*
6. *The Duties incorporated in clause 3 of the draft contract are consistent with the requirements of a senior tax auditor performing the tax compliance role.*
7. *The Cabinet decision did not approve appointments to middle management positions. The Cabinet approved recruitment to high level positions and the position of Tax Auditor is a high level position”.*

[57] In his evidence in answer to Ms. Nelson, Attorney-at-Law for the Employer Mr. Johnson reiterated his position that he “*did not promise Ms. Sargeant any position other than that of Tax Auditor. (He) never promised her any job which involved her as a member of any elite team”.*

[58] In answer to Mr. Symister Attorney-at-Law for Ms. Sargeant, Mr. Johnson stated as follows:

“At the time I had the initial discussions with Ms. Sargeant I did engage in a general discussion with her which concerned how the Ministry of Finance wanted to re-arrange the IRD. I was looking for qualified Antiguan & Barbudans who could perform at the highest level inclusive of the senior management level.”

Hyacinth Bailey

[59] Hyacinth Bailey resides at Falmouth. She became Commissioner of Inland Revenue from June 15, 2007 and retired from that position on August 01, 2011.

[60] Ms. Bailey signed a Witness Statement on August 30 2011. The contents of that Witness Statement are true. In that Statement Ms. Bailey stated at **paragraph [2]** as follows:

“2. Ms. Sargeant joined the Inland Revenue Department from 2nd July 2007. Pursuant to the Cabinet instructions of 6th December 2006 I informed her that she was being appointed as Tax Auditor, non-established, Inland Revenue Department. I provided a copy of her job description to the Permanent Secretary in the Ministry of Finance”.

[61] Ms. Bailey stated that in the IRD there is in existence a Manual which lists the duties and responsibilities of all employees who work in that Department. She duly informed Ms. Sargeant from the outset of her employment that her work as a Tax Auditor includes the audit of companies’

financial statements and the preparation of necessary assessments of tax which they would be required to pay to the IRD.

[62] Ms. Bailey obtained a computer for Ms. Sargeant. According to Ms. Bailey she asked an officer of the IRD to show Ms. Sargeant the process of compiling an assessment on the required assessment form.

[63] Ms. Bailey stated that during Ms. Sargeant's period of employment with the IRD *"At no time during her tenure was Ms. Sargeant required to report to any person other than the Commissioner of Inland Revenue and the Permanent Secretary in the Ministry of Finance"*.

[64] In the initial period of her employment Ms. Bailey stated that she gave Ms. Sargeant certain files for work to be done on them. According to Ms. Bailey this work was not done.

[65] According to Ms. Bailey, from September 2007 to February 2008 Ms. Sargeant performed functions as team leader for the Audit Section, which dealt with corporate clients. Ms. Bailey stated that this was not a position of a managerial nature. As team leader Ms. Sargeant examined the assessments conducted by members of the team and co-ordinated their work.

[66] Ms. Bailey gave evidence that communication between Ms. Sargeant and other staff members broke down between September 2007 and February 2008. Members of the audit staff complained of Ms. Sargeant's bossy attitude towards them.

[67] Ms. Bailey stated that in February 2008 she met with members of the audit staff inclusive of Ms. Sargeant. As the head of the IRD she disbanded the teams which she previously established. After doing this Ms. Bailey assigned work to Ms. Sargeant *“in accordance with her appointment letter”* namely *“the assessment of company files more specifically the large tax cases”*.

-see paragraph [7] of Ms. Bailey’s Witness Statement.

[68] Between the period February 2008 and April 2009 Ms. Bailey assigned certain large tax files to Ms. Sargeant. These included the Bank of Nova Scotia, First Caribbean International Bank and the Royal Bank of Canada.

[69] In her evidence Ms. Bailey recalled the file which dealt with the Bank of Nova Scotia. She stated that apart from a letter which Ms. Sargeant wrote to that bank, no follow up work was done by her. Ms. Bailey re-assigned that file to another auditor. With respect to the other matters which she assigned to Ms. Sargeant, Ms. Bailey stated that Ms. Sargeant did not do much work to advance the interest of the Department.

[70] In answer to Mr. Symister, Attorney-at-Law for Ms. Sargeant, Ms. Bailey stated that during Ms. Sargeant’s orientation period July to September 2007 an officer attached to the IRD was assigned to assist Ms. Sargeant.

[71] In further reply to Mr. Symister, Ms. Bailey stated that between February 2008 and May 28, 2009 Ms. Sargeant *“did not audit any files during this period”*. In her evidence Ms. Bailey informed the Court that in September 2008 she requested Ms. Sargeant *“to discuss these files with (her) and she*

did not discuss them with me". It is Ms. Bailey's testimony that during this period Ms. Sargeant "*never brought an audit report to (her)*".

Ms. Doleen Lee

[72] Doleen Lee resides at Gambles Terrace in St. John's. She occupied the position of Permanent Secretary in the Ministry of Finance from October 2005 to March 2011 when she retired from the Civil Service.

[73] Ms. Lee signed a Witness Statement on August 31, 2011. In her testimony she stated that the contents of that statement are true and correct.

[74] In her answer to Mr. Symister, Ms. Lee stated that the duties and responsibilities contained in the draft contract were not changed.

Analysis of the evidence

[75] (i) What was the effective date of termination of Ms. Sargeant's employment?

The letter of termination of employment was contained in the Employer's Memorandum. It was marked "**EM-4**". It was addressed to Ms. Sargeant. It was dated July 31, 2009. It states *inter alia* as follows:

"Dear Ms. Sargeant;

I have to inform you that the Cabinet of Antigua & Barbuda has decided that your employment as Tax Auditor be terminated with immediate effect.

Your employment as Tax Auditor is terminated with effect from 1 August; 2009."

(ii) The last paragraph states as follows:

“you will receive three (3) months payment in lieu of termination.”

[76] Was Ms. Sargeant’s contract of employment terminated “*with immediate effect*”, “*with effect from, 1 August 2009*”, or after the expiration of three (3) months “*termination notice*”.

[77] (i) I have found **Chapman v Letheby & Christopher Ltd. [1981] IRLR 440 (EAT)** helpful to determine the effective date of termination. In that case Mr. Chapman was employed by the employee as catering manager and a supervisor. In January 1980 Mr. Chapman and his employer experienced certain disagreements. He was subsequently dismissed by a letter written by his immediate superior dated February 27, 1980. The letter stated *inter alia* as follows:

“I have therefore no alternative but to terminate your employment with Letheby & Christopher from Saturday 10.5.80.

Under the terms of your contract of employment’ you are entitled to nine weeks notice....and as such you will be paid your retainer payment for this period in lieu of notice”.

(ii) The issue to be decided in that case was whether the employee had presented his claim for unfair dismissal within the three-month limitation period. Mr. Justice Browne-Wilkinson in writing the decision of the Court stated at **page 443 paragraph [15]** as follows:

“If a reasonable employee were to ask himself ‘from what date I am dismissed?’ he would in our view rightly look to the part of the letter

which tells him that expressly, ie the words ‘from Saturday 10.5.80’. He might then wonder why he was being paid ‘in lieu of notice’; but in our view it would not be right to allow this doubt as to the effect of those words to override the clear statement of the date of termination earlier in the letter. Those words might well be referring, inaccurately, to an intention to pay the wages down to the date of termination notwithstanding that Mr. Chapman was not being called on to work out his notice. There is nothing said expressly that the payment is to be in advance in one lump sum”.

- (iii) In the context of that case the Court held that the employee was dismissed *“from Saturday 10.5.80”*. His claim for unfair dismissal was made within the statutory period.

[78] I therefore hold that Ms. Sargeant was dismissed summarily in accordance with the letter of dismissal *“with effect from 1 August, 2009”*.

What were the reasons for her dismissal?

[79] The letter of dismissal stated *inter alia* as follows:

“The following are the reasons for the termination of your employment:

- *The refusal to sign the contract of employment*
- *The many unsuccessful letters and meeting which were held with you to resolve the matter*
- *Your non-performance and general failure to complete the assignments delegated to you by the Commissioner of Inland Revenue*

- *Your failure to provide value for monies received by you in accordance with Cabinet decision No. 82 of 5 December, 2006”.*

[80] **Ian Smith and Gareth Thomas** the learned authors of the textbook **Smith & Wood’s Employment Law 9th edition, Oxford University Press, 2008** at **page 493** states as follows:

*“The general approach has been that the tribunal’s task is to discover the reason actually motivating the employer at the time of the dismissal. In **Abernethy v Mott, Hay and Anderson, [1974], ICR 323 Cairns L J** said:*

“A reason for the dismissal of an employee is a set of facts known to the employer; or it may be of beliefs held by him, which cause him to dismiss the employee.”

[81] In this case the Employer has put forward four (4) reasons why it dismissed the Employee. This involves a question of balance. If one of these reasons is found not to be proved what is the importance to be attached to the others? The learned authors of the text book **Smith & Thomas (op cit)** state at **page 494** *inter alia* as follows:

“At the heart of the matter of labelling lies a question of balance. It is clearly important in practice that a relatively lax approach should be taken to the label applied by the employer. On the other hand, too lax an approach could leave too much leeway for an employer to operate a ‘shotgun’ defence – to make multiple allegations, under different heading, against the employee and hope that one or two are accepted by the tribunal. A major step towards preventing improper use of such tactics was taken by the House of Lords in

Smith v City of Glasgow District Council. The employer put forward a mixture of reasons for dismissal, relating to incompetence and misconduct, crystallized into three substantive allegations; the tribunal found that one of them had not been made out but proceeded to find the dismissal generally fair. This reasoning was disapproved by the House of Lords, since what appeared to be an integral part of the reason for dismissal had not been proved (or, at least, proved to have been the subject of reasonable belief by the employer). This case does not mean that an employer cannot plead several reasons and win; it does mean, however, that if one of several reasons put forward collapses the employer must go further and show that the collapsed reason was not, or did not form a significant part of, the principal reason for the dismissal (ie that the remaining reasons were more important and justified the dismissal by themselves); according to the House of Lords, that had not been shown on the facts of this case. Clearly, the more reasons the employer loads into the shotgun (and the more he eventually fails to prove), the more difficult this will be to establish.”

[82] I therefore hold that the reasons as set out in the letter of dismissal are the reasons why the Employer dismissed the Employee. In addition what weight should be given to each reason is a matter which I shall now address.

Do the reasons for dismissal constitute misconduct by the Employee within the meaning of Section 58 (1) (a) of the Labour Code?

(a) **The refusal to sign the contract of employment.**

[83] Section C5 (1) of the Labour Code states as follows:

“C5. (1) Every person who employs another shall, within ten days of such employment, furnish said employee with a written statement which shall set forth

(a) the general responsibilities and related duties for which the employee is being employed;

(b) the regular hours of work, and rest periods;

(c) the starting pay, and method of computing same;

(d) the term of employment, if other than indefinite;

(e) the period of probation, if any;

(f) the employee’s leave and vacation privileges; and

(g) his obligations if any, imposed under section J13.”

[84] In **England v British Telecommunications plc [1992] IRLR 323** the Court of Appeal was required to decide whether the terms of a letter correctly set out the terms of the appellant’s employment. In the course of the judgment **Lord Justice Leggatt** at **page 327** stated as follows:

“If an essential term such as a written statement must contain has not been agreed, there will be no agreement. If it has, it is the duty of the Industrial Tribunal, where necessary, to identify the term as having been agreed, whether expressly, by necessary implication or by inference from all the circumstances, including in particular the conduct of the parties without recourse to intervention.”

Lord Justice Parker at **page 326** of the judgment stated that

“it is necessary to look at the terms of the contract. Having looked at the terms of the contract, a conclusion can be reached as to what is the legal label properly attachable to that contract. But I cannot see how the fact that internally one party, when actually proceeding to act, may have some mistaken impression as to the correct legal label, can affect what was agreed between them. The task of the Tribunal is to find out whether the particulars in the statement accurately reflect the position.”

[85] In that case the Court of Appeal dismissed the employee’s appeal. It held in the words of **Leggatt L J** at **page 327** *“that there was evidence upon which it was entitled to conclude that items 6, 7 and 8 in its letter were the result of agreement between the parties, and not, as the Employment Appeal Tribunal found, left unresolved”*.

[86] The Employee’s starting pay, the term of employment, a term for vacation leave and other terms were clearly set out in Exhibits **“EM-1”** and **“EM-2”**. It is the Employees own evidence contained in her Witness Statement at **paragraph [3]** thereof that she *“was offered and....accepted an offer of employment from the Government of Antigua & Barbuda and commenced working at the Inland Revenue Department (IRD), on July 2, 2007”*.

[87] It is readily conceded by Ms. Sargeant that the offer of employment which was accepted from Mr. Johnson was clearly the position of Tax Auditor.

- [88] Mr. Johnson in his evidence gave the reasoning which clearly explained the nature of the offer he made to Ms. Sargeant.
- [89] Ms. Lee the Permanent Secretary in the Ministry of Finance by letter dated July 17, 2007 informed Ms. Sargeant that she was offered a position of Tax Auditor, a non-established position attached to the IRD, Ministry of Finance. In that letter Ms. Lee informed Ms. Sargeant that the contract of employment would be prepared by the Ministry of Legal Affairs. It would be required to be signed by Ms. Sargeant. This letter was forwarded to Ms. Bailey the Commissioner of the IRD.
- [90] In a MINUTE from the Solicitor General to the Permanent Secretary, Ministry of Finance dated August 14, 2007 he enclosed the contract of employment to be signed by Ms. Sargeant. Ms. Lee wrote on that letter as follows *“copy given to Ms. Sargeant for perusal”*. This letter was marked **“DL-4”**.
- [91] There is no evidence which shows exactly when Ms. Lee forwarded the draft contract of employment to Ms. Sargeant. However Ms. Sargeant received it from Ms. Lee. Ms. Sargeant forwarded a letter dated February 14, 2008 to Ms. Lee. Three paragraphs of that letter appear below.

“Dear Miss Lee:

Re: Contract for Ronda Sargeant

Regrettably, I am unable to affix my signature to the contract in its current form. It has been my understanding in all of the discussions that I have held with Senator Lenworth Johnson in 2006 and 2007 that the position though unnamed at the time, to which I would be assigned at the Inland Revenue

Department (IRD) or the Tax Compliance Unit, eventually, was at the management level with supervisory authority.

Furthermore, I was led to believe in discussions with the Honourable Minister of Finance and the Economy, Dr. Errol Cort in 2005, and Senator Johnson subsequently that I would be a part of an elite team of four (4) to five (5) persons who would work autonomously, fleshing out the positions as they had never been previously defined exactly.

.....

My struggles should be with non-compliant taxpayers and not within the IRD or with the Ministry of Finance”.

[92] Ms. Lee replied to Ms. Sargeant’s letter of February 14, 2008. It states as follows:

“Dear Ms. Sargeant,

Your letter of February 14, 2008 refers:

Please be advised that I am guided by decisions of the Cabinet of Antigua & Barbuda, and as such I am not able to give you an appointment which speaks otherwise.

You may wish to have further discussions with the Honourable Minister of Finance and Senator Johnson.

Best wishes,

.....

Permanent Secretary

Ministry of Finance & the Economy”

This letter is marked “DL-3”.

[93] Ms. Sargeant by letter dated May 15, 2008 wrote to The Honourable Dr. Errol Cort, the then Minister of Finance and the Economy. That letter is reproduced below as follows:

*"The Honourable, Dr. Errol L. Cort,
Minister of Finance & the Economy,
The Ministry of Finance & the Economy
Parliament Drive
St. John's, Antigua*

May 15m 2008

Dear Sir:

Re: Contract Change

Pursuant to our discussion on April 24th, 2008, please find enclosed details of the clauses of the contract that I propose be changed.

The changes affect the paragraph numbered "1." In terms of the position title and also the paragraph numbered "3." and titled "DUTIES".

As indicated, the name of the position is changed and so entirely are the details of the duties assigned to same.

I trust that the suggested changes will be to the mutual satisfaction of all concerned.

Thank you for your cooperation and assistance in this matter. I look forward to hearing from you.

Yours truly,

.....
Ronda R. H. Sargeant
c/o Inland Revenue Department
Ministry of Finance & the Economy
Newgate Street,
St. John's, Antigua"

(This letter was admitted as "DL-4").

[94] Ms. Sargeant required certain major changes to be made to the original draft contract. These were a change from Tax Auditor to "**Middle Manager Tax Audit and Investigation or Tax Manager/ Inspector** and a change in the duties at Clause 3. Those changes are identified below under the heading "**CHANGES TO CONTRACT**".

"CHANGES TO CONTRACT

WHEREAS the Government is desirous of obtaining the services of the Officer as **Middle Manager Tax Audit and Investigation or Tax Manager/Inspector**, within the Inland Revenue Department, Ministry of Finance and the Economy; and

NOW IT IS HEREBY AGREED as follows:

1. The Government will employ the Officer....serve the Government as **Middle Manager Tax Audit and Investigation OR Income Tax Manager/Inspector** within the Inland Revenue Department.....contract of employment shall be sooner determined as hereinafter provided.

2. **DUTIES**

- a) Manage an audit and assessing section or unit.
- b) Determine goals and objectives
- c) Supervise functional audit and assessing work.
- d) Measure, evaluate and communicate section performance and progress.

- e) *Assist audit personnel below the rank or level of middle management, in the performance of audits i.e. preparing for the audit, monitoring and approving audit plans and audit reports.*
- f) *Resolve matters of dispute such as informal objections to assessments, audit procedures etc., and provide explanations to tax payers and their representatives.*
- g) *Serve as liaison between section personnel and upper management.*
- h) *Coordinate audit functions with other sections.*
- i) *Engage in tax planning exercises e.g. creating and generating meaningful management reports as necessary, training, planning, assigning and reviewing work.*
- j) *Lead and motivate the audit and assessing section or unit.*
- k) *Perform other related duties.*

[95] Ms. Sargeant wrote a letter to Ms. Bailey dated October 02, 2008. She stated *inter alia* as follows:

“There appears to be some confusion regarding the level at which I am expected to function at the Inland Revenue Department (IRD). When I was recruited, I was informed that the position would be at the management level and semi-autonomous, reporting to the Commissioner of Inland Revenue. The level of remuneration appears to support that premise.”

(This letter was admitted as “DL-5”).

[96] Ms. Sargeant wrote another letter to Ms. Bailey. It is dated November 06, 2008. In that letter she requested Ms. Bailey to reply to her letters. (This letter was admitted as “DL-6”).

[97] Ms. Sargeant writes again to Ms. Lee. Her letter is dated November 25, 2008. Ms. Sargeant once again states that *“the contract does not reflect the position which was discussed and promised verbally when I was abroad”*. Her reservation regarding the name of the position was also expressed. (This letter was admitted as **“DL-7”**).

[98] Ms. Lee responded to Ms. Sargeant’s letter of November 25, 2008. Her letter is dated November 27, 2008. In her reply Ms. Lee stated *inter alia* that *“the matter is out of (her) hands.”* (This letter was marked as **“DL-8”**).

[99] Ms. Lee wrote to Ms. Sargeant by letter dated May 05, 2009. It was marked **“DL-9”**. It states as follows:

“May 5, 2009

Our Ref: FIN P 13/49 – 1551

Miss Rhonda Sargeant

FMC(Hon). PD Audit Ed. Cert

Tax Auditor

Inland Revenue Department

Newgate Street

St. John’s

Antigua.

Dear Ms. Sargeant,

I have to refer to the many Contracts of Employment that have been prepared in light of your objections.

Your employment on Contract which started July 2, 2007 and ends on July 1, 2010 has not been signed.

As a result of discussions held with the Legal Department, I have to advise that this is our final offer and you are given until May 15, 2009 to sign your contract. If the contract is not signed by the date stipulated, it will be treated that you have not accepted the offer and that the employment relationship would come to an end.

Please be guided accordingly.

Yours sincerely,

.....
*Permanent Secretary
Ministry of Finance, the Economy and Public Administration*

c.c. Commissioner of Inland Revenue, Inland Revenue Department

:dl/dp”

[100] Ms. Sargeant’s statement that when she was abroad presumably in **Canada that a managerial position at the IRD was offered to her is untrue.** At that time the evidence is that she communicated with Mr. Johnson. His letter dated December 08, 2006 is addressed to her at her Canadian address. It contains the position of Tax Auditor which was offered to her.

[101] There is no evidence whatsoever that any of the government officials to whom Ms. Sargeant made reference in this judgment made any offer to her of any managerial position whatsoever at the IRD or elsewhere.

[102] I hold that Ms. Sargeant had and continues to have a mistaken impression of the position in which she was expected to function at the IRD. She should not have formed this impression, however, because she agreed with Mr. Johnson to accept the position of Tax Auditor attached to the IRD.

[103] In the circumstances of this case I find that the particulars which are set out in the draft contract inclusive of (a) the title of Tax Auditor (b) the duties of Tax Auditor and (c) all the other clauses, do accurately reflect the entire contractual terms between the Employer and Employee from July 02, 2007 to July 31, 2009.

[104] (a) The request by the Employer in this case for the Employee to sign the contract of employment was a lawful and reasonable order. In her evidence the Employee stated that she agreed with all of the other terms except clause 3 which concerned her duties to be performed as Tax Auditor. No evidence exists which prohibited Ms. Sargeant from signing the contract of employment. In the circumstances of this case Ms. Sargeant's refusal to sign the contract of employment constitutes misconduct.

(b) The many unsuccessful letters and (meetings) which were held with Ms. Sargeant to resolve the matter.

[105] Some letters were written by Ms. Sargeant to Ms. Lee and some were written by Ms. Lee to Ms. Sargeant. As well, Ms. Sargeant wrote some letters to certain government officials. The issue to be decided is whether or not these evince an intention by Ms. Sargeant not to be bound by the terms of the contract and hence she misconducted herself.

[106] The tone is set for an understanding of those letters by reference to one written by Ms. Sargeant to Ms. Lee. It is dated February 14, 2008. At **paragraph [5]** of that letter Ms. Sargeant stated as follows:

“So far as I am aware there is not a single person (not a single one) at the IRD, who possess the level of certification, qualification or experience which I bring to the IRD, for me to be treated in the manner of an ordinary school leaver”.

[107] As early as March 11, 2008 Ms. Sargeant was firstly warned that no appointment other than that of a Tax Auditor would be made available to her. This is contained in Ms. Lee’s letter to her of the same date.

[108] Ms. Sargeant did not receive a reply from Ms. Bailey with respect to the letters dated October 02, 2008 and November 06, 2008. In the letter of October 02, 2008, Ms. Sargeant stated *inter alia* as follows:

“However, in reality, it appears that you are operating from a different premise, as evidenced by your attempts to marginalize the position, to neutralize any impact or benefits that could be derived from my association with the IRD, and to minimize my contribution to the development of a better functioning IRD.

I am unable and averse to accept your vision of my role in the IRD, since I cannot function at the junior level to which you have relegated the position. Having regard to the level of remuneration that the government and people of Antigua & Barbuda are providing for the position I hold, it seems incongruous to expect functioning at the junior level”.

[109] (i) Ms. Sargeant’s review of the IRD was expressed in her letter dated November 25, 2008, to Ms. Lee. It states in part as follows:

“Having been invited to return to this, the country of my birth, to perform a service using my knowledge, expertise and experience garnered abroad, to date, almost entirely so, all that I have encountered are nothing but roadblocks and derailment. I reiterate I am unable to function in the Inland Revenue Department (IRD) at the junior levels to which the promised position has now seemingly been relegated. Worse, in my opinion, the environment in which there is no planning, no program, no policies, no procedures, no objectives/goals, no system of communication, extremely low staff morale, a lack of proper administration highlighted by management by chaos, which is not accommodating to the contributions of others not steeped in the uncoordinated and lopsided efforts at revenue management that exists at the IRD, does not bode well for the future of an organization as important as the IRD, which currently appears unable to fulfil its own motto.

Regrettably, if the situation is not addressed and resolved immediately, I fear that the only other alternative left to me, is to

seek legal counsel in this matter, that it may be concluded in a manner satisfactory to all.

I look forward to a speedy resolution, and the opportunity to serve my country.”

- (ii) Ms. Sargeant copied this letter to the Minister of Finance, Parliamentary Secretary in the Ministry of Finance and the Financial Secretary.

[110] This letter clearly shows that Ms. Sargeant as at November 25, 2008, did not have a healthy relationship or any respect for the workers of the IRD. In her own words she was *“unable to function in the Inland Revenue Department (IRD) at the junior levels to which the promised position has now seemingly been relegated”*.

[111] No one who worked in a managerial capacity at the IRD was spared the wrath of Ms. Sargeant’s pen. According to her there was *“management by chaos and the Department appeared to be failing”*.

-see Exhibit “DL-7”.

[112] Ms. Sargeant fails to understand how the Civil Service works. It is a bureaucracy which is defined as a system of government by officials, responsible only to their department chiefs.

[113] The Cabinet of Ministers is supported by a large body of civil servants. One set of Civil Servants are the Permanent Secretaries. Another arm of

government which works to support the Cabinet of Ministers is the office of the Solicitor General.

[114] The second letter of warning issued by Ms. Lee to Ms. Sargeant was dated May 05, 2009. In that letter Ms. Lee warned Ms. Sargeant to have the contract signed on or before May 15, 2009 failing which the *“employment relationship would come to an end”*.

[115] Ms. Sargeant displayed a lack of respect for Ms. Lee and the Legal Department of the Solicitor General’s Chambers. These are her exact words:

“In response to your letter dated May 5, 2009 and received on May 07, 2009, I take this opportunity to remind you, that the decision to award a contract of employment to me was taken by the Cabinet of Antigua & Barbuda AND NOT WITH EITHER YOURSELF AS PERMANENT SECRETARY IN THE MINISTRY OF FINANCE AND THE ECONOMY OR WITH THE LEGAL DEPARTMENT.” (the emphasis in capitals is mine)

-see Ms. Sargeant’s letter to Ms. Lee dated May 07, 2009 which is Exhibit “DL-10”.

[116] In the same letter dated May 07, 2009, Ms. Sargeant made reference to a meeting held at the Ministry of Finance sometime prior to March 30, 2009. According to her present at that meeting were the Minister of Finance, the Junior Minister of Finance, the Commissioner of the IRD, the Permanent Secretary Ms. Lee, and herself. The outcome of this meeting did not satisfy Ms. Sargeant.

[117] A meeting was also convened with the current Minister of Finance sometime in or about May 2009. According to Ms. Sargeant the Minister of Finance made a statement to her to the effect that he had the authority to recommend to the Cabinet that the contract should come to an end. This statement was in fact a third warning to Ms. Sargeant. However it did not cause Ms. Sargeant to mend her ways.

[118] I hold that the request by Ms. Sargeant to be offered the position of Middle Manager/Tax Audit would have conflicted with the current Cabinet decision. Ms. Lee in her Witness Statement at **paragraph [3]** stated as follows:

“Sometime around August or September 2007 the draft contract was forwarded to Ms. Sargeant. She wanted changes made to the position from Tax Auditor to Middle Manager Tax Auditing. I sought to have the matter resolved but it could not be changed to Middle Manager Tax Auditing as requested by Ms. Sargeant since this would have rendered it inconsistent with the Cabinet decision and the letter of 17th July offering her employment as Tax Auditor”.

[119] The behaviour of Ms. Sargeant as displayed in some relevant letters and meetings referred to at **paragraphs [106] to [109] and [113] to [116]** above clearly leads me to find that the Employee did not wish to be bound by the terms of the contract of employment.

(c)The non-performance and general failure to complete the assignments delegated to Ms. Sargeant by the Commissioner of the IRD.

[120] Ms. Bailey by letter dated May 28, 2009 to Ms. Sargeant requested her to provide a report which should include reasons why the Employee failed to complete certain work with regard to certain files.

This letter was admitted as “DL-10”. It is reproduced below.

“28th May, 2009

Dear Miss Sargeant,

You are hereby requested to provide a written explanation for your non-performance with respect to the completion of files assigned to you during the period 5th February 2008 to 4th April 2009. Listed below are the names of the files:

1. *The Royal bank of Canada.*
2. *First Caribbean International Bank (Barbados) Limited- (Antigua Branch).*
3. *First Caribbean International Finance Corporation.*
4. *The Bank of Nova Scotia.*
5. *Caribbean Development (Antigua) Limited.*

Kindly submit your response no later than Thursday 4th June 2009.

.....

Commissioner of Inland Revenue”

[121] Ms. Sargeant’s response to Ms. Bailey is contained in her letter to her dated June 04, 2009. It was admitted as EM-3. It is reproduced below.

*"Hyacinth Bailey,
Acting Commissioner Inland Revenue Department
Newgate Street,
St. John's, Antigua*

Thursday, June 04, 2009

Dear Miss Bailey:

In response to your letter dated 28th May, 2009, I refer you to my letters to you dated Thursday, October 02, 2008 and Thursday, November 06, 2008, respectively, both of which have yet to receive a response.

With further reference to your letter above noted, the tasks assigned are not within the scope of managerial employment. In fact, those tasks that had been within that scope, were arbitrarily removed by you in the meeting you held on February 4th, 2008, without any explanation, which explanation I have been seeking without success to date.

I continue to respectfully await your written response , to all of my correspondence (including this one) to you, as to your reasons for the curtailment of my professional responsibilities as discussed and agreed upon before mu arrival at the Inland Revenue Department on Tuesday, July 2nd, 2007.

I look forward to hearing from you at your earliest convenience.

Yours respectfully,

.....
*Ronda R. H. Sargeant,
Inland Revenue Department
Newgate Street,*

St. John's, Antigua"

[122] Ms. Bailey in her evidence stated that Ms. Sargeant *"did no work on those files"*. She requested a meeting with Ms. Sargeant to discuss this matter. According to Ms. Bailey, Ms. Sargeant did not discuss this matter with her.

[123] In answer to Ms. Nelson Attorney-at-Law for the Employer, Ms. Sargeant stated as follows:

"I did the work that was required to be done on those files. No I did not state in my letter of June 04, 2009 to Ms. Bailey that I had performed the work on those files."

[124] Ms. Bailey requested Ms. Sargeant to provide her work with *"a written explanation for (her) non performance with respect to the completion of files assigned to her during the period 5th February 2008 to 4th April 2009."*

[125] Ms. Bailey's request to Ms. Sargeant was clear and concise. As the Commissioner of the IRD her opinion was of a three-fold nature. Firstly, she had perused the files. Secondly, she stated that the requisite work was not done upon them by Ms. Sargeant. Thirdly, she required a written explanation from Ms. Sargeant on or before June 04, 2009.

[126] This request was a lawful and reasonable order made by Ms. Bailey to Ms. Sargeant. She was duty bound to honour that request as it pertained to her contract of employment as a Tax Auditor. The request was also a simple one for Ms. Sargeant to comply with.

[127] I do not believe Ms. Sargeants' reply to Ms. Bailey that she had done the required work. I believe Ms. Bailey's evidence when she stated that Ms. Sargeant "***did no work on those files.***"

[128] My finding in this regard is also contained in Ms. Sargeant's written reply to Ms. Bailey. She stated *inter alia* as follows:

"With further reference to your letter above noted, the tasks assigned are not within the scope of managerial employment".

[129] Ms. Sargeant at this stage of her working relationship with the IRD on June 04, 2009 is still concerned with her own self aggrandisement. A reasonable request is made of her to discharge her duties as Tax Auditor in 2009. However she is still concerned about the events of 2007 and non-responses to her letters of October 02, 2008 and November 06, 2008.

[130] She is absolutely clueless of the implications of (a) the non-replies from the Cabinet members to her request; and (b) the three warnings to which I previously made reference at **paragraphs [106] to [109] and [113] to [116]** of this judgment.

[131] In the circumstances of this case Ms. Sargeant's refusal to perform her duties with respect to certain files for the period February 05, 2008 to April 04, 2009 is a reason which falls within section C58 (1) (a) of the Labour Code.

(d)The failure of the Employee to provide value for monies received by her accordance with Cabinet Decision No. 82 of 5th December; 2006.

[132] Ms. Nelson in her Written Submissions stated as follows:

“Ms. Sargeant’s non-performance and general failure to complete assignments delegated to her by the Commissioner of Inland Revenue and her failure to provide value for monies received by her (are) two of the grounds given for her termination (and which constitutes) misconduct on her part within the meaning of the Labour Code as submitted above disentitling her to payment of gratuity”.

[133] Mr. Symister made no submissions with regard to this head of dismissal.

[134] It seems however that what this reason for the Employee’s dismissal contemplates is that if the Employee (a) fails to execute her audit functions under the terms of the contract; (b) spends some of time in the writing of letters and attends certain meetings and (c) refuses to sign a written contract of employment; then in these circumstances a Court may be asked to hold that where a lot of time is spent on non-productive activities, then in this case the Employee may not have been functioning at a level which is consistent with her contract of employment. No specific evidence was led by the Ministry of Finance to show what was the level of performance of work by a comparable employee of the IRD. It does not appear to me that this reason was by itself a major factor why the Employer dismissed the Employee.

Issue No. 2

Did the Employer act reasonably or unreasonably in treating the reasons for dismissal as sufficient reasons for dismissing the Employee.?

[135] The two cases cited by Mr. Symister Attorney-at-Law for the Employee were of little assistance. This Court is well aware of the heads of damage contained in The **Epicurean Limited** case (op cit). The **Premier Beverage Limited** case (op cit) was a claim for outstanding monies and a counter claim for damages for unfair dismissal and severance benefits.

[136] The two cases cited by Ms. Nelson Attorney-at-Law for the Employer were of some assistance. However each case must be determined upon its own individual facts. The cases were **Elphina Abraham** (op cit) and **Henry v Mount Gay Distilleries Ltd.** (op cit).

[137](i) I have found the case of **Farnborough v The Governors' of Edinburgh College of Art [1974] IRLR 245** to be helpful. The relevant facts are as follows:

“The appellant, a lecturer, did not agree with a programme of re-organisation involving a new allocation of teaching duties put forward by his head of department. Despite being ordered by his Head of Department to do so the appellant maintained that he had no time to teach the class in question and posted a notice to that effect for the students’ information. This conflict led to his dismissal”.

- (ii) The Industrial Tribunal found that he was fairly dismissed. This finding was upheld on appeal. **Lord Thompson** delivered the Court's judgment. At **page 246** of the judgment **Lord Thompson** stated as follows:

“The respondent’s reason for dismissing him was that he refused to co-operate and in particular refused to carry out reasonable instructions within the course of his duties.”

- (iii) At **page 247** of the judgment **Lord Thompson** stated as follows:

“The Tribunal were fully entitled on the evidence to take the view that in the whole circumstances a warning of possible dismissal was unnecessary, since an educated man in a responsible academic position must, or at last certainly ought to, have appreciated from the course of events in 1972 that his failure to co-operate in the work of the Department as directed by the Head of the department must put his employment at risk. There is no rule of law that it is unfair to dismiss an employee without first warning him of the risk of dismissal if he does not mend his ways. Each case must depend on its own circumstances”.

[138] Ms. Sargeant stated that she is the holder of a Bachelor of Commerce Degree, a Certificate in Financial Management and an Adult Education Certificate. According to her *“there is not a single person (not a single one) at the IRD, who possess the level of certification, qualification or experience”* which she has obtained. In the circumstances of this case Ms. Sargeant knew or ought to have known that her continued deliberate

obstinacy, insubordination and insulting behaviour directed partly to Ms. Bailey and to a lesser extent Ms. Lee was conduct which was unbecoming of an employee of her standing and position at the IRD. It was behaviour or conduct which struck at the very root of the employment relationship between her and the Employer. It was incompatible with the continuance of this relationship.

[139] This form of obstinacy, insubordination and insulting behaviour amounts to misconduct in accordance with Section C58 (1) (a) of the Labour Code.

[140] One of the matters which I am required to examine is whether or not the Employer carried out an investigation of the Employee's complaints. I am satisfied that the Employer implemented an investigation of Ms. Sargeant's concerns. Meetings were held with her. She was given opportunities to express herself verbally and in writing. Such efforts by the Employer were reasonable in the circumstances.

[141] Enough time had elapsed between July 02, 2007 and June 2009 for this Employee to change her ways and be subject to all contractual terms.

[142] That Ms. Sargeant refused to mend her ways left the Employer with no choice but to dismiss her. This action by the Employer was within a band or range of reasonable responses by an employer.

Costs

[143] In accordance with Section 10 (2) of the Industrial Court Act Cap. 214 of the Laws of Antigua & Barbuda the Court "*shall make no order as to costs in*

any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise...”

[144] The facts of this case show very clearly that Ms. Sargeant should never have brought this claim against the Employer. No grounds existed whatsoever in support of her claim that any government official promised her any managerial position at the IRD. On the contrary, she clearly accepted the position as Auditor at the IRD. An Auditor’s position was never part of the management at the IRD.

[145] In these circumstances Ms. Sargeant’s claim in addition to the matters stated at **paragraph [143]** in my opinion do constitute exceptional reasons which resulted in an abuse of the process of this court.

[146] I derive much assistance in my findings from the **Elphina Abraham** case op cit and in particular the judgment of **Hariprashad Charles J**, at **paragraphs [44] and [45]** of the judgment.

[147] Employees must never be hindered in the commencement of cases before this Court. The body of evidence is that in the vast overwhelming number of cases employees are never required to pay costs if they do not prevail.

[148] Mr. de Freitas agrees that the Reference be dismissed. He does not agree that the Employee should pay any costs. He is not available due to illness to sign the judgment.

[149] However, in this case I order that the Employee do pay the Employer's costs. Ms. Nelson is employed by the Crown. This is a factor which I have taken into consideration to arrive at an assessment of costs which are lower than I would have otherwise ordered. In the circumstances of this case I order Ms. Sargeant to pay the Employer's costs in the sum of \$2,500.00.

[150]The Reference is dismissed. The costs of \$2,500.00 shall be paid by the Employee to the Employer on or before the 31st day of October, 2012.

Dated this the 24th day of September, 2012



PHILIP A. PILGRIM
President

I concur with the President's judgment.



M. ALTHEA CRICK
Member

I also concur with the President's judgment subject to my dissent with regard to costs at paragraph [148].

ST. LAWRENCE DE FRIETAS
Member

